2022 Annual Review
Bid Protests Panel

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492 F.3d 1308
United States Court of Appeals,
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BLUE & GOLD FLEET, L.P., Plaintiff–Appellant,
v.
UNITED STATES, Defendant–Appellee,
and
Hornblower Yachts, Inc., Defendant–Appellee.

No. 2006–5064.
|
June 26, 2007.

Synopsis

Background: Incumbent contractor filed pre-award bid protest against the United States, protesting award and seeking injunction against award of contract. Successful bidder intervened as defendant. The United States Court of Federal Claims, Christine O.C. Miller, J., 70 Fed.Cl. 487, granted judgment on administrative record to United States and successful bidder. Incumbent contractor appealed.

Holdings: The Court of Appeals, Gajarsa, Circuit Judge, held that:

[1] incumbent contractor's assertions that proposals had to be evaluated according to Service Contract Act was challenge to terms of solicitation;

[2] as a matter of first impression, party who has opportunity to object to terms of government solicitation containing patent error and fails to do so prior to close of bidding process waives its ability to raise same objection subsequently in bid protest action in Court of Federal Claims;

[3] incumbent contractor waived its objection to terms of solicitation based upon solicitation's failure to require compliance with Service Contract Act; and

[4] National Park Service's conclusion that successful proposal satisfied bid requirements was not arbitrary, capricious, or abuse of discretion under Administrative Procedure Act (APA).

Affirmed.

West Headnotes (7)

[1] **Federal Courts** Nature of evidence supporting findings

Although the substantial evidence standard of Administrative Procedure Act (APA) applies to the trial court's review of agency findings, when the Court of Federal Claims makes factual findings from the administrative record in the first instance, Court of Appeals reviews such findings for clear error, as with any finding in a bench trial. 5 U.S.C.A. § 706(2)(E).

6 Cases that cite this headnote

[2] **Public Contracts** In general; advertising
Public Contracts Evaluation process
United States In general; advertising
United States Evaluation process

Although decision of National Park Service not to apply Service Contract Act to contract for concession services at national historic landmark site might have influenced evaluation of proposals received, decision was made during solicitation phase of bidding process, since bidders were not required to consider Act, and therefore incumbent contractor's assertions that proposals had to be evaluated according to Act was challenge to terms of solicitation, rather than challenge to proposal evaluations. 10 U.S.C.A. § 2305(b)(1); Service Contract Act of 1965, § 2 et seq., 41 U.S.C.A. § 351 et seq.

131 Cases that cite this headnote

[3] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Party who has opportunity to object to terms of government solicitation containing patent error and fails to do so prior to close of bidding process waives its ability to raise same objection subsequently in bid protest action in Court of Federal Claims. 28 U.S.C.A. § 1491(b)(1, 3); 4 C.F.R. § 21.2(a)(1).

242 Cases that cite this headnote

[4] **Public Contracts** Patent ambiguity doctrine; duty to inquire before bidding

United States Patent ambiguity doctrine; duty to inquire before bidding

Under "doctrine of patent ambiguity," which is exception to general rule of contra proferentem used by courts to construe ambiguities against document's drafter, when government solicitation contains patent ambiguity, government contractor has duty to seek clarification from government and its failure to do so precludes acceptance of its interpretation in subsequent action against government.

42 Cases that cite this headnote

[5] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Incumbent contractor waived its objection to terms of government solicitation for contract to provide concession services at national historic landmark site based upon solicitation's failure to require compliance with Service Contract Act when, despite having opportunity to do so, incumbent contractor failed to raise issue prior to closing of bidding process. 28 U.S.C.A. § 1491(b); Service Contract Act of 1965, § 2 et seq., 41 U.S.C.A. § 351 et seq.

160 Cases that cite this headnote

[6] **Public Contracts** Patent ambiguity doctrine; duty to inquire before bidding

United States Patent ambiguity doctrine; duty to inquire before bidding

Incumbent contractor's challenge to successful proposal for contract to provide concession services at national historic landmark site, based upon contention that successful bidder did not include required number of ferry trips to site, relied upon patent ambiguity in National Park Service's solicitation prospectus for which incumbent contractor failed to seek clarification during bidding process, and therefore incumbent contractor's interpretation of solicitation could not be accepted in its action challenging bid award, and Service's conclusion that successful proposal satisfied bid requirements was not arbitrary, capricious, or abuse of discretion under Administrative Procedure Act (APA). 5 U.S.C.A. § 706(2)(A).

73 Cases that cite this headnote

[7] **Federal Courts** Interlocutory, Collateral, and Supplementary Proceedings and Questions; Pendent Appellate Jurisdiction

Unsuccessful bidder's argument that amendments which were made to contract to provide concession services for national historic landmark site after contract was awarded violated Concessions Management Improvement Act, thereby rendering contract void, concerned legality of contract and was separate and distinct from unsuccessful bidder's challenge to terms of underlying solicitation, and therefore argument was not properly before Court of Appeals on appeal in unsuccessful bidder's bid protest action and would not be considered. National Park Service Concessions Management Improvement Act of 1998, § 402 et seq., 16 U.S.C.A. § 5951 et seq.

4 Cases that cite this headnote

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Attorneys and Law Firms

***1310** Alan I. Saltman, Saltman & Stevens, P.C., of Washington, DC, argued for plaintiff-appellant. With him on the brief was Ruth G. Tiger.

Sean M. Dunn, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee, United States. With him on the brief were Peter D. Keisler, Assistant Attorney General, and Kathryn A. Bleecker, Assistant Director. Of counsel was Carolyn A. Lown, United States Department of the Interior, Office of the Solicitor, of Oakland, CA.

Kevin R. Garden, The Garden Law Firm, P.C., of Alexandria, VA, argued for defendant-appellee, Hornblower Yachts, Inc. Of counsel were Brian A. Bannon and Andrew W. Dyer, Jr., Blank Rome LLP, of Washington, DC.

Before BRYSON, GAJARSA, and DYK, Circuit Judges.

Opinion

GAJARSA, Circuit Judge.

This is an appeal from a pre-award bid protest filed under 28 U.S.C. § 1491(b). The plaintiff, Blue & Gold Fleet, L.P. ("Blue & Gold"), appeals the decision of the United States Court of Federal Claims granting judgment on the administrative record to the defendants, the United States and Hornblower Yachts, Inc. ("Horn blower"), allowing the United States to award the contract to Hornblower. ***1311** *Blue & Gold Fleet, L.P. v. United States* ("*Judgment on Admin. Record* "), 70 Fed.Cl. 487 (2006). For the reasons stated below, we affirm.

I.

This court summarizes the following background facts, which the parties do not dispute, based on the findings of the Court of Federal Claims.

Alcatraz Island is a National Historic Landmark site situated in the San Francisco Bay, attracts over 1.3 million visitors per year, and generates over $13 million per year in revenue. The National Park Service ("Park Service") is the government entity responsible for the maintenance of Alcatraz and for the "solicitation and selection of contractors to provide ferry transportation, sell concessions, and perform other Alcatraz-related services." *Judgment on Admin. Record,* 70 Fed.Cl. at 489.

Blue & Gold was the incumbent ferry operator. *Id.* In July 2004,

> the Park Service issued a notice of availability of a prospectus for the solicitation of proposals for the Alcatraz concession contract. The proposed contract was to include land and water transportation to and from the island, food and beverage services, ticket sales, as well as maintenance of visitor arrival, assembly, and departure facilities.

Id. at 490 (footnote omitted). The solicitation prospectus contained instructions stating that questions must be submitted "in writing ... no later than 30 days in advance of the due date" of the proposals. To ensure complete dissemination of the bidding information, the Park Service, if it received any questions regarding the solicitation, would distribute the answer to any such questions to all potential offerors. *Id.* at 512–13. "The closing date for the receipt of the proposals originally was November 24, 2004, but was extended to March 30, 2005." *Id.* at 490.

The solicitation prospectus also notified offerors that the Park Service would evaluate the proposals using specific selection factors and subfactors, worth a total maximum of thirty points, and the proposal with the highest score would be selected. These factors and subfactors included the financial viability of the offeror, the proposed franchise fee to the government, compliance with Tier 2 emission standards, [1] commitment to state of the art technology and alternative fuel sources for vessels, and the quality of visitor services. *Id.* at 490–91.

[1] Tier 2 emission standards are EPA emissions standards for non-road engines. 40 C.F.R. Part 89.

After receiving the various proposals, the Park Service convened a review panel. The panel issued an extensive evaluation summary that described the narrative basis for scoring each of the factors considered in the proposals.

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After scoring each proposal based on the enumerated factors, the panel awarded Hornblower the highest overall score of 26.5 points and Blue & Gold the second highest score of 21.5 points. The panel recommended that the Park Service award Hornblower the contract, and the Regional Director of the Park Service approved the panel's recommendation. In September 2005, the Park Service advised all of the offerors that Hornblower had been selected and would be awarded the contract. *Id.* at 491–92.

In October 2005, Blue & Gold filed a protest with the Government Accountability ***1312** Office ("GAO") regarding the selection decision. In response to concerns about the GAO's jurisdiction, Blue & Gold also filed a bid protest in the Court of Federal Claims pursuant to 28 U.S.C. § 1491(b), protesting the award and requesting an injunction enjoining the Park Service from awarding the contract. Because of the Court of Federal Claims action, the GAO subsequently dismissed the protest before it. *Id.* at 492.

On cross-motions for judgment on the administrative record, the Court of Federal Claims held that the Park Service's actions were not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," and thus, that Blue & Gold failed to meet its burden on the most important factor required to enjoin the award of the contract—success on the merits. Moreover, balancing the factors required for the issuance of an injunction, the Court of Federal Claims determined that the harm to the Park Service and Hornblower outweighed any irreparable harm to Blue & Gold and that an injunction was not in the public interest. Accordingly, the Court of Federal Claims entered judgment in favor of the United States and Hornblower. *Id.* at 514. Blue & Gold filed a timely appeal to this court.

We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

II.

A.

We have stated that "[t]his court reviews the trial court's determination on the legal issue of the government's conduct, in a grant of judgment upon the administrative record, without deference." *Bannum, Inc. v. United States,* 404 F.3d 1346, 1351 (Fed.Cir.2005) (citations omitted). That is, "this court reapplies the 'arbitrary and capricious' standard of § 706," and "the inquiry is whether the [government]'s procurement decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Id.* (quoting 5 U.S.C. § 706(2)(A); other citations omitted); *see also* 28 U.S.C. § 1491(b)(4) (stating that in bid protest actions, Court of Federal Claims and district courts "shall review the agency's decision pursuant to the standards set forth in section 706 of title 5").

[1] The substantial evidence standard of 5 U.S.C. § 706(2)(E) "applies to the trial court's review of agency findings." *Bannum,* 404 F.3d at 1357 (citation omitted). Where the Court of Federal Claims makes factual findings from the administrative record in the first instance, however, "this court reviews such findings for clear error," "like any finding in a bench trial." *Id.*

B.

Blue & Gold asserted that because Hornblower's proposal did not include the wages and benefits for its employees required by the Service Contract Act, 41 U.S.C. §§ 351–358, the Park Service mistakenly evaluated Hornblower's proposal as financially viable and as allowing Hornblower to offer the Park Service a higher franchise fee. *Judgment on Admin. Record,* 70 Fed.Cl. at 512. The Court of Federal Claims found that Blue & Gold "missed its chance to protest" based on the Service Contract Act because Blue & Gold (1) was attempting to challenge the terms of the solicitation, rather than the evaluation process, and (2) did not raise the challenge prior to the submission of the proposals. *Id.* at 513–14.

***1313** On appeal, Blue & Gold asserts that the Court of Federal Claims erred on both grounds.

1.

[2] While Blue & Gold characterizes this as a challenge to the evaluation of Hornblower's proposal, we agree with the Court of Federal Claims that this argument is properly characterized as a challenge to the terms of the solicitation. By statute, the Park Service must "evaluate ... proposals and make an award based solely on the factors specified in the solicitation." 10 U.S.C. § 2305(b)(1). In this case, it is true that the decision not to apply the Service Contract Act to the contract may have influenced the evaluation of the proposals; however, the Park Service made this decision during the solicitation, not evaluation, phase of the bidding process. The terms of the solicitation prospectus did not

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include any requirement that the bidders consider the Service Contract Act, and thus, the Park Service could not decide at the time of the evaluation to apply the Act. Therefore, Blue & Gold's assertion that the proposals should have been evaluated according to the Act is a challenge to the solicitation.

2.

[3] We also hold that a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims. This is an issue of first impression for this court. Section 1491(b) of title 28 U.S.Code provides the Court of Federal Claims with "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency." 28 U.S.C. § 1491(b)(1). In doing so, the statute mandates that "the courts shall give due regard to the interests of national defense and national security and *the need for expeditious resolution of the action*." *Id.* § 1491(b)(3) (emphasis added). Recognition of a waiver rule, which requires that a party object to solicitation terms during the bidding process, furthers this statutory mandate.

[4] Similarly, we have recognized the doctrine of patent ambiguity where the party challenging the government is a party to the government contract. "The doctrine of patent ambiguity is an exception to the general rule of *contra proferentem*, which courts use to construe ambiguities against the drafter." *E.L. Hamm & Assocs., Inc. v. England,* 379 F.3d 1334, 1342 (Fed.Cir.2004). We have applied the doctrine of patent ambiguity in cases where, as here, a disappointed bidder challenges the terms of a solicitation after the selection of another contractor. *See Stratos Mobile Networks USA, LLC v. United States,* 213 F.3d 1375, 1381 (Fed.Cir.2000); *Statistica, Inc. v. Christopher,* 102 F.3d 1577, 1582 (Fed.Cir.1996). Under the doctrine, where a government solicitation contains a patent ambiguity, the government contractor has "a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation" in a subsequent action against the government. *Stratos,* 213 F.3d at 1381 (quoting *Statistica,* 102 F.3d at 1582). This doctrine

> was established to prevent contractors from taking advantage of the government, protect other bidders by assuring that all bidders bid on the same specifications, and materially aid the administration ***1314** of government contracts by requiring that ambiguities be raised before the contract is bid, thus avoiding costly litigation after the fact.

Cmty. Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1580 (Fed.Cir.1993).

These reasons underlying the patent ambiguity doctrine apply with equal force in the bid protest context. In the absence of a waiver rule, a contractor with knowledge of a solicitation defect could choose to stay silent when submitting its first proposal. If its first proposal loses to another bidder, the contractor could then come forward with the defect to restart the bidding process, perhaps with increased knowledge of its competitors. A waiver rule thus prevents contractors from taking advantage of the government and other bidders, and avoids costly after-the-fact litigation. Accordingly, the same reasons underlying application of the patent ambiguity doctrine against parties to a government contract speak to recognizing a waiver rule against parties challenging the terms of a government solicitation.

We find further support, first, in the GAO's adoption of a similar rule in its bid protest regulations. Specifically, 4 C.F.R. § 21.2(a)(1) requires that "[p]rotests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals."

We note that several decisions of the Court of Federal Claims have recognized the utility of the GAO timeliness regulation and concluded that where there is a "deficiency or problem in a solicitation ... the proper procedure for the offeror to follow is not to wait to see if it is the successful offeror before deciding whether to challenge the procurement, but rather to raise the objection in a timely fashion." *N.C. Div. of Servs. for the Blind v. United States,* 53 Fed.Cl. 147, 165 (2002); *see also Argencord Mach. & Equip., Inc. v. United States,* 68 Fed.Cl. 167, 175 n. 14 (2005); *MVM, Inc. v. United States,* 46 Fed.Cl. 126, 130 (2000); *Allied Tech. Group, Inc. v. United States,* 39 Fed.Cl. 125, 146 (1997); *Aerolease Long Beach v. United States,* 31 Fed.Cl. 342, 358 (1994). The reasons expressed

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by the Court of Federal Claims mirror those underlying the patent ambiguity doctrine.

> It would be inefficient and costly to authorize this remedy after offerors and the agency had expended considerable time and effort submitting or evaluating proposals in response to a defective solicitation. Vendors cannot sit on their rights to challenge what they believe is an unfair solicitation, roll the dice and see if they receive award [sic] and then, if unsuccessful, claim the solicitation was infirm.

Argencord, 68 Fed.Cl. at 175 n. 14.

Second, in the patent context, we have recognized that analogous doctrines of laches and equitable estoppel operate to bar relief even though there is no applicable statute of limitations. *See A.C. Aukerman Co. v. R.L. Chaides Constr. Co.,* 960 F.2d 1020, 1032 (Fed.Cir.1992) (en banc) ("Since there is no statute from which to determine the timeliness of an infringement action, vis-a-vis the patentee's first knowledge of infringement, courts use the equitable doctrine of laches." (quoting *Leinoff v. Louis Milona & Sons,* 726 F.2d 734, 741 (Fed.Cir.1984))); *id.* at 1041 ("Equitable estoppel to assert a claim is another defense addressed to the sound discretion of the trial court.").

With these analogous doctrines as well, we note that several decisions of the Court ***1315** of Federal Claims have recognized their utility in the bid protest context. *See, e.g., Transatlantic Lines LLC v. United States,* 68 Fed.Cl. 48, 52, 57 (2005) (considering "delay in procurement process" in balance of hardships prong of injunctive relief); *Wit Assocs., Inc. v. United States,* 62 Fed.Cl. 657, 662 n. 5 (2004) ("[I]n some cases, serious delay in raising a claim may impact the equities in determining whether an injunction should issue or lead to the imposition of laches."); *CW Gov't Travel, Inc. v. United States,* 61 Fed.Cl. 559, 568–69 (2004) (considering delay as part of laches analysis); *Software Testing Solutions, Inc. v. United States,* 58 Fed.Cl. 533, 535–36 (2003) (stating that delay may be "considered in the multi-factored analysis of whether injunctive relief is warranted" or in "the application of equitable doctrines such as laches"); *Miss. Dep't of Rehab. Servs. v. United States,* 58 Fed.Cl. 371, 372–73 (2003) (same).

Therefore, while it is true that the jurisdictional grant of 28 U.S.C. § 1491(b) contains no time limit requiring a solicitation to be challenged before the close of bidding, the statutory mandate of § 1491(b)(3) for courts to "give due regard to ... the need for expeditious resolution of the action" and the rationale underlying the patent ambiguity doctrine favor recognition of a waiver rule. Recognition of this rule finds further support in the GAO's bid protest regulations and in our analogous doctrines. Accordingly, a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection afterwards in a § 1491(b) action in the Court of Federal Claims.

3.

[5] Having recognized a waiver rule in § 1491(b) bid protest actions, we must decide whether the Court of Federal Claims erred in applying it to this case.

Blue & Gold asserts that the government's solicitation was improper because it did not require compliance with the Service Contract Act. The Court of Federal Claims concluded that Blue & Gold knew of the Park Service's "longstanding policy, codified by regulation, of not applying the prevailing wage provisions of the Service Contract Act to its concession contracts." *Judgment on Admin. Record,* 70 Fed.Cl. at 513 (citing 36 C.F.R. § 51.3).

> Plaintiff knew of this policy for at least three reasons. First, plaintiff's existing concession contract with the Park Service does not contain a wage determination pursuant to the Service Contract Act. Second, the Park Service included in the prospectus a copy of its regulations, among which was 36 C.F.R. § 51.3. Finally, regulations require that any prospectus applying the Service Contract Act include the applicable, currently effective wage determination specifying the minimum wages and fringe benefit

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> for service employees to be employed under the contract. The prospectus issued by the Park Service did not include such information, signifying that the Park Service was not applying the Act. Despite its awareness that the Park Service was not applying the Service Contract Act to the proposals, plaintiff waited until after Hornblower's proposal was selected to protest.

Id. (citations omitted). This court perceives no error in these findings and therefore, concludes that Blue & Gold waived its opportunity to raise the issue prior to the closing of the bidding process.

Moreover, Blue & Gold has not asserted good cause to excuse its delay in notifying ***1316** the government of its objection. This court also notes that there appears to be no harm to the intended beneficiaries of the Service Contract Act. The government asserts, and Blue & Gold does not dispute, that the Park Service has acquiesced to the subsequent determination of the Department of Labor that the Act apply to the awarded contract. Rule 28(j) Letter, Dec. 5, 2006. All parties have also asserted in their briefs that the intended beneficiaries, i.e., employees furnishing services to the government, [2] are represented in pending matters [3] with the Park Service.

2 *See* Service Contract Act, Pub.L. No. 89–286, 79 Stat. 1034 (1965) (stating that purpose of Service Contract Act is to "provide labor standards for certain persons employed by Federal contractors to furnish services to Federal agencies, and for other purposes"); S.Rep. No. 89–798 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 3737, 3737 ("The purpose of this bill is to provide labor standards for the protection of employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal agencies.").

3 It appears that the affected employees have brought two actions in the Northern District of California asserting that the Service Contract Act applies to the contract at issue. *Inlandboatmen's Union of the Pac. v. Mainella,* No. 06–2152 (N.D.Cal. filed Mar. 23, 2006); *Int'l Org. of Masters, Mates & Pilots v. Nat'l Park Serv.,* No. 06–2107 (N.D.Cal. filed Mar. 21, 2006).

Under these circumstances, the Court of Federal Claims properly found that Blue & Gold had failed to object in a timely fashion to the terms of the prospectus. There was no error in holding for the defendants on Blue & Gold's challenge pursuant to the Service Contract Act.

C.

Blue & Gold asserts several other errors in the decision of the Court of Federal Claims. We find them to be unpersuasive for the following reasons.

[6] First, Blue & Gold asserts that the Court of Federal Claims erred in evaluating Hornblower's proposal because it failed to include the required number of round trips to Alcatraz. Blue & Gold contends that because of this error, Hornblower received more points in the Park Service's evaluation than it should have. The prospectus included operating plans that specified in table form a number for the "# BOATS EACH DAY." It is undisputed that Hornblower's proposal met this number.

These operating plan tables, however, also specified departure schedules, which Blue & Gold interprets as requiring more trips than Hornblower proposed. Assuming arguendo that Blue & Gold's interpretation is reasonable, Blue & Gold's challenge relies on a patent ambiguity in interpreting the Park Service's solicitation prospectus. Under such circumstances, as discussed *supra* Part II.B.2, the government contractor has "a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation" in a subsequent action against the government. *Stratos,* 213 F.3d at 1381 (quoting *Statistica,* 102 F.3d at 1582). Blue & Gold does not assert that it sought clarification, and thus, the Park Service's conclusion that Hornblower's proposal satisfied the requirements of the proposal by including sufficient trips to satisfy the daily boat requirement was not "arbitrary, capricious, [or] an abuse of discretion." *See* 5 U.S.C. § 706(2)(A).

Next, Blue & Gold asserts that the Court of Federal Claims erred because ***1317** Hornblower's proposal included inaccurate information regarding compliance with emission standards, its ability to operate boats using primarily solar power, and the date by which it would complete construction of its departure facilities. This argument requires Blue & Gold

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to show that the misrepresentations were both material and relied on by the Park Service. *See Data Gen. Corp. v. Johnson,* 78 F.3d 1556, 1562 (Fed.Cir.1996) (requiring a protestor to "show not only a significant error in the procurement process, but also that the error prejudiced it"); *see also Bannum,* 404 F.3d at 1353; *Galen Med. Assocs., Inc. v. United States,* 369 F.3d 1324, 1330 (Fed.Cir.2004). Here, the Court of Federal Claims found that Blue & Gold had not shown that any of these misrepresentations was material nor that the Park Service relied on them. We perceive no error in these findings, and therefore, this argument fails as well.

[7] Lastly, Blue & Gold asserts in its reply brief that amendments made to the contract subsequent to its award violate the Concessions Management Improvement Act, 16 U.S.C. §§ 5951–5966, and that the contract is therefore void. However, this argument concerns the legality of the contract and is separate and distinct from Blue & Gold's challenge to the terms of the solicitation. It is not properly before this court, and we therefore decline to consider it.

III.

For the foregoing reasons, we affirm the decision of the Court of Federal Claims.

AFFIRMED

Each party shall bear its own costs for this appeal.

All Citations

492 F.3d 1308

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KeyCite Yellow Flag - Negative Treatment
Abrogation Recognized by SEKRI, Inc. v. United States, Fed.Cl., March 9, 2021

779 F.3d 1376
United States Court of Appeals,
Federal Circuit.

BANNUM, INC., Plaintiff–Appellant
v.
UNITED STATES and Dismas Charities, Inc., Defendants–Appellees.
Bannum, Inc., Plaintiff–Appellant
v.
United States, Defendant–Appellee.

Nos. 2014–5085, 2014–5086.
|
March 12, 2015.

Synopsis

Background: Disappointed bidder on contract with Bureau of Prisons (BOP) for community-based housing for federal offenders brought action against United States, alleging that solicitation of bids was defective. Winning bidder intervened. The United States Court of Federal Claims, Mary Ellen Coster Williams, J., 115 Fed.Cl. 148, dismissed action for lack of subject matter jurisdiction. Disappointed bidder appealed. In another post-award bid protest case on separate contract, the United States Court of Federal Claims, Nancy B. Firestone, J., 2014 WL 1373739, granted judgment on the administrative record against disappointed bidder. Disappointed bidder appealed.

Holdings: The Court of Appeals, Taranto, Circuit Judge, held that:

[1] disappointed bidder waived its ability to challenge solicitations in Court of Federal Claims, and

[2] disappointed bidder failed to preserve its separate challenges to bid evaluations.

Affirmed on other grounds.

Procedural Posture(s): On Appeal.

West Headnotes (6)

[1] **Federal Courts** Questions of Law in General

Federal Courts "Clearly erroneous" standard of review in general

Court of Appeals reviews the legal conclusions by the Court of Federal Claims de novo and its factual findings for clear error. 28 U.S.C.A. § 1491(b).

[2] **Federal Courts** Jurisdiction

Where no material facts are in dispute, the Court of Appeals reviews the determination by the Court of Federal Claims of its own jurisdiction without deference.

[3] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

A bidder that challenges the terms of a solicitation in the Court of Federal Claims generally must demonstrate that it objected to those terms prior to the close of the bidding process; if it cannot do so, the bidder waives its ability to raise the same objection afterwards in a bid protest action in Court of Federal Claims. 28 U.S.C.A. § 1491(b).

28 Cases that cite this headnote

[4] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Through mere notice of dissatisfaction with requirement for compliance with Prison Rape Elimination Act (PREA), disappointed bidder did not adequately present pre-award objection to solicitation of contract with Bureau of Prisons (BOP) for community-based housing for federal offenders, as required to preserve defective-

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solicitation challenge, and thus disappointed bidder waived its ability to subsequently challenge solicitation in Court of Federal Claims, since solicitation and governing regulations put disappointed bidder on notice of formal requirements for filing "protest" that would trigger agency obligation of response and prompt resolution, disappointed bidder did not comply with those requirements, and it did not pursue other available means of formal protest until after awards, such as protest to Government Accounting Office or Court of Federal Claims. 28 U.S.C.A. § 1491(b); 31 U.S.C.A. § 3553(c)(1); 42 U.S.C. §§ 15601 et seq.; 48 C.F.R. § 2852.233–70(e), (i), (j).

28 Cases that cite this headnote

[5] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Disappointed bidder failed to preserve its separate challenges to bid evaluations, since disappointed bidder rested its argument for standing exclusively on its challenge to solicitation; disappointed bidder did not contend that it had standing independent of resolicitation remedy it sought or that resolicitation would be result of successful challenge to evaluation processes.

15 Cases that cite this headnote

[6] **Federal Courts** Failure to mention or inadequacy of treatment of error in appellate briefs

An issue that falls within the scope of the judgment appealed from but is not raised by the appellant in its opening brief on appeal properly may be deemed waived.

1 Cases that cite this headnote

Attorneys and Law Firms

***1377** Justin Huffman, Camardo Law Firm, P.C., Auburn, N.Y., argued for plaintiff-appellant in 2014–5085 and 20145086. Also represented by Joseph A. Camardo, Jr.

Antonia Ramos Soares, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States in 2014–5085 and 2014–5086. Also represented by Russell J. Upton, Joyce F. Branda, Robert E. Kirschman, Jr., Donald E. Kinner.

Alexander D. Tomaszczuk, Pillsbury Winthrop Shaw Pittman LLP, McLean, VA, argued for defendant-appellee Dismas Charities, Inc. in 2014–5085. Also represented by Alexander Brewer Ginsberg.

Before TARANTO, CLEVENGER, and CHEN, Circuit Judges.

Opinion

***1378** TARANTO, Circuit Judge.

Bannum, Inc. protests decisions of the Bureau of Prisons of the United States Department of Justice to award two contracts to other bidders. In two actions brought in the Court of Federal Claims, Bannum complained that the awards were improper, alleging a common defect in the terms of the solicitations and, also, problems in the evaluation of competing bids. In each case, the Court of Federal Claims dismissed Bannum's suit. Finding that Bannum's proposal, by failing to commit Bannum to a fixed price, was materially out of compliance with the terms of the solicitation, the court concluded that Bannum was not an "interested party" entitled to bring its protest under 28 U.S.C. § 1491(b).

We affirm the dismissals of Bannum's suits, but on a different basis. We conclude that, because Bannum did not adequately present its objection to the solicitations before the awards, Bannum waived its ability to challenge the solicitations in the Court of Federal Claims. We also conclude that, on appeal, Bannum failed to preserve its separate challenges to the bid evaluations. We do not reach the "interested party" ground of the Court of Federal Claims' decisions.

BACKGROUND

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In the first of the two separately filed protest actions before us on appeal, Bannum protests the government's award of a fixed-price, indefinite-delivery, requirements-type contract to intervenor Dismas Charities, Inc., for the operation of a residential reentry center for federal offenders in Tupelo, Mississippi. The government published the solicitation, Request for Proposals (RFP) No. 200–1168–SE, in February 2012, inviting interested bidders to submit initial proposals by April 23, 2012. Only Bannum and Dismas submitted offers.

Over the next fifteen months, the government sent notices to the two bidders altering the contract requirements and requesting updated proposals. Amendment No. 5, issued in February 2013, added a requirement that the facility be operated in compliance with the Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. §§ 15601–15609. The government asked both bidders to sign the amendment and submit a final proposal revision, including any necessary changes in price.

Whereas Dismas evidently signed the amendment without further ado, Bannum responded with a six-page letter labeled "Final Proposal Revision # 3 and AGENCY PROTEST," in which it restated its earlier price proposal and noted that those prices "do not, and cannot, reflect any consideration for the effects of Amendment 5" because of the "enormous amount of information [that] is required prior to pricing this new contract requirement." 14–5085 J.A. 11109. Bannum attached a signed copy of Amendment No. 5, placing an asterisk next to the term requiring PREA compliance and stating: "Subject to and limited by Bannum's response to [Final Proposal] # 3 ... submitted herewith; also, subject to Bannum's reservation of all rights and protests." *Id.* at 11115–16. Bannum repeated its objection four months later, when the government asked the bidders for final bids that confirmed their pricing after incorporating updated wage rates. On July 19, 2013, the contracting officer evaluated the offers, and on August 26, 2013, the government awarded Dismas the contract.

In September 2013, after the award, Bannum filed a protest with the Government Accountability Office (GAO), alleging defects in the government's evaluation of the proposals. When its GAO protest failed, Bannum filed suit in the Court of Federal Claims on February 19, 2014, ***1379** seeking a preliminary injunction to prevent implementation of the contract. Bannum again challenged the bid evaluation as flawed and added a new allegation that the solicitation itself was "materially defective" because of the PREA-compliance requirement and the government's refusal to provide pricing guidance. 14–5085 J.A. 26. The court denied Bannum's request for preliminary relief. *Bannum, Inc. v. United States,* 115 Fed.Cl. 257, 275 (2014). In a memorandum opinion issued several weeks later, the court granted motions (by the government and Dismas) to dismiss the case, concluding that Bannum was not an "interested party" under § 1491(b) because it submitted a bid that was materially out of compliance with the terms of the solicitation. *Bannum, Inc. v. United States,* 115 Fed.Cl. 148, 155–56 (2014). Accordingly, the court lacked jurisdiction to hear Bannum's suit. *Id.* at 156.

Bannum's second action differs from its first only in ways we deem immaterial. The solicitation, RFP No. 2001182–SE, involves a different place of performance (Florence, South Carolina), a different competitor (the Alston Wilkes Society, Inc.), and several minor differences in the scope of work and evaluation criteria. But the procurement followed essentially the same path as the Mississippi procurement. The government amended the solicitation to require PREA compliance, and Bannum responded by explaining its inability to price PREA compliance and clarifying that it "reserve[d] all rights to [requests for equitable adjustments], Claims, and Protests," 14–5086 J.A. 10882, though without featuring the word "protest" as prominently as in its correspondence in the Mississippi case, *id.* at 10876.

On August 8, 2013, the government evaluated the bids and awarded the contract to Alston Wilkes. Bannum filed a protest with the GAO on August 20, 2013, asserting only that the government's evaluation process was flawed. The GAO denied the protest in November 2013, and Bannum filed suit in the Court of Federal Claims on January 16, 2014. As in the Mississippi action, Bannum reasserted its challenge to the evaluation process and newly argued that the solicitation itself was materially defective.

Both sides moved for judgment on the administrative record, and the government moved separately to dismiss for lack of jurisdiction. The court granted the government's motion to dismiss, concluding that, because Bannum submitted a non-compliant proposal, it lacked the economic interest in the outcome of the award necessary to mount a protest under § 1491(b). *Bannum, Inc. v. United States,* No. 14–CV–40, 2014 WL 1373739, at *4–5 (Fed.Cl. Apr. 8, 2014).

Bannum timely appealed both decisions. We have jurisdiction under 28 U.S.C. § 1295(a)(3). We consolidated the cases for oral argument and now decide them together.

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DISCUSSION

[1] **[2]** 28 U.S.C. § 1491(b) grants the Court of Federal Claims "jurisdiction to render judgment on an action by an interested party objecting to" a solicitation or contract award made by a federal agency. We review the Court of Federal Claims' legal conclusions de novo and its factual findings for clear error. *Daewoo Eng'g & Const. Co. v. United States,* 557 F.3d 1332, 1335 (Fed.Cir.2009). Where, as here, no material facts are in dispute, we review the Court of Federal Claims' determination of its own jurisdiction without deference. *Taylor v. United States,* 303 F.3d 1357, 1359 (Fed.Cir.2002).

Because Bannum's two distinct grounds for protesting the awards—(a) a defect in the solicitations and (b) defects in the bid-evaluation process—entail different remedies ***1380** and are subject to different legal standards, *see COMINT Sys. Corp. v. United States,* 700 F.3d 1377, 1382 n. 4 (Fed.Cir.2012), we address them separately.

A

[3] A bidder that challenges the terms of a solicitation in the Court of Federal Claims generally must demonstrate that it objected to those terms "prior to the close of the bidding process." *Blue & Gold Fleet, L.P. v. United States,* 492 F.3d 1308, 1315 (Fed.Cir.2007). If it cannot do so, the bidder "waives its ability to raise the same objection afterwards in a § 1491(b) action." *Id.; see also COMINT,* 700 F.3d at 1381–82.

[4] It is undisputed that the government received notice of Bannum's dissatisfaction with the PREA-compliance requirement before awards were made. We conclude, however, that mere notice of dissatisfaction or objection is insufficient to preserve Bannum's defective-solicitation challenge. The solicitations at issue and the governing regulations put Bannum on notice of the formal requirements for filing a "protest" that would trigger an agency obligation of response and prompt resolution. Bannum did not comply with those requirements; nor did it pursue other available means of formal protest (*e.g.,* to the GAO or the Court of Federal Claims) until after the awards. In these circumstances, it waived its solicitation challenges.

Our waiver rule implements Congress's directive in the Administrative Dispute Resolution Act (ADRA) of 1996, Pub.L. No. 104–320, § 12, 110 Stat. 3870, 3874, that courts "shall give due regard to ... the need for expeditious resolution" of protest claims. 28 U.S.C. § 1491(b)(3); *see Blue & Gold,* 492 F.3d at 1313. A waiver rule implements this statutory mandate by reducing the need for the "inefficient and costly" process of agency rebidding "after offerors and the agency ha[ve] expended considerable time and effort submitting or evaluating proposals in response to a defective solicitation." *Blue & Gold,* 492 F.3d at 1314 (internal quotation marks and citation omitted). In this context, clarity is not just readily achievable but important. Requiring that the prescribed formal routes for protest be followed (to avoid waiver) reduces uncertainty about whether the issue is joined and must be resolved, and thereby helps prevent both the wasted and duplicative expenses (of all bidders and the government) and the delayed implementation of the contract that would likely follow from laxer standards of timely presentation of solicitation challenges.

In *COMINT,* we suggested that filing a formal, agency-level protest before the award would likely preserve a protestor's post-award challenge to a solicitation, 700 F.3d at 1382, as might a pre-award protest filed with the GAO, *id.* at 1383 (citing 4 C.F.R § 21.2 ("Protests based upon alleged improprieties in a solicitation ... *shall be filed* prior to bid opening or the time set for receipt of initial proposals.") (emphasis added)). The rules applicable to both GAO protests and agency-level protests make clear why that should be so. The filing of a protest grants protestors certain remedies (a stay of award) and ensures that the government will resolve the matter in a timely fashion.

In the GAO, the act of filing a protest generally triggers an automatic stay of any award of the contract, 31 U.S.C. § 3553(c)(1), and requires the GAO to issue a decision within 100 days, § 3554(a)(1); *see also* § 3554(a)(2) (requiring the Comptroller General to provided expedited review in certain cases). The Justice Department's acquisition regulations, promulgated in 1998 after an executive order directed agency heads to "provide for inexpensive, informal, procedurally ***1381** simple, and expeditious resolution of protests," Exec. Order No. 12979, 60 Fed.Reg. 55171, 55171 (Oct. 25, 1995), provide similar guarantees. *See* 63 Fed.Reg. 16118, 16133 (Apr. 2, 1998). Bidders that file a formal protest are entitled to a scheduling conference within five days of filing, an automatic stay of the award pending disposition of the dispute, and a guarantee of prompt resolution of the protest. *See* 48 C.F.R. § 2852.233–70(e), (i), (j).

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Bannum does not dispute the availability of those means for presenting and ensuring responses to solicitation objections before an award is made, and at least two of the means—a GAO protest and an agency-level protest—were explicitly set forth in the solicitations at issue. Nor does Bannum contend that its objections amounted to a formal protest. Oral Argument at 11:45–12:05, *Bannum, Inc. v. United States,* 2014–5085, –5086 ("Bannum did not submit a formal protest but it did ... multiple times ask for guidance."). Bannum also has not challenged any of the procedures made available to it as unduly burdensome or impractical, or asserted that there was good cause for excusing its failure to comply with them. *See COMINT,* 700 F.3d at 1382 (failure to mount a pre-award protest may be excusable where doing so "is not practicable").

Having failed to follow any of the various protest procedures available to bidders for swiftly resolving objections to the terms of the solicitation, Bannum cannot raise the same challenge in the Court of Federal Claims now that an award has been made. Bannum waived the solicitation challenge by not properly raising it before the close of bidding. *See Blue & Gold,* 492 F.3d at 1314. We therefore need not address whether, regarding its solicitation challenge, Bannum is an "interested party" under our case law, which itself has taken into account, in certain circumstances, whether a party has timely presented and diligently pressed its protest. *See, e.g., CGI v. United States,* No. 2014–5143, 779 F.3d 1346, 2015 WL 1015678 (Fed.Cir. Mar. 10, 2015).

B

[5] Our conclusion that Bannum waived its challenge to the terms of the solicitation does not dispose of the separate question of whether, once we accept the PREA-compliance requirement as beyond dispute, we should conclude that Bannum is nevertheless an "interested party" under § 1491(b) with standing to protest the allegedly defective evaluation processes. As the government agreed at oral argument, at least as a general matter, a bidder cannot be expected to challenge an agency's evaluation of bids, in contrast to the terms of solicitation, until the evaluation occurs. *See* Oral Argument at 29:14–29:43. We need not address Bannum's bid-evaluation challenges, however, because we conclude that Bannum has failed to preserve those challenges on appeal.

In its complaints, Bannum pleaded grounds for protest that fall into two categories: a defect in the solicitations; and defects in the bid-evaluation processes. The Court of Federal Claims in both cases ruled on Bannum's protest without treating the two types of grounds for protest separately. It concluded in both cases that, because Bannum submitted a materially non-compliant bid, its offer could not form the basis for a proper award and, consequently, that Bannum lacked standing to challenge any aspect of the procurement process.

On appeal, however, Bannum rests its argument for standing exclusively on its challenge to the solicitation, contending that, if it were to succeed in that challenge, "the [government] would be obligated to rebid the contract, and Bannum would ***1382** have the opportunity to compete in the resolicitation." 14–5085 Appellant Opening Br. 7; 14–5086 Appellant Opening Br. 10 (identical language); *see also* 14–5085 Appellant Opening Br. 6, 9 (Bannum seeks "resolicitation of the contract"); 14–5086 Appellant Opening Br. 11, 12. Bannum has not argued to us that the denial of standing must be reversed, in any event, as to its defective-evaluation challenges, which it did not meaningfully mention in its briefs on appeal—either in its opening briefs or, when responding to the government's waiver argument, in its reply briefs. Bannum has not contended that it has standing independent of the resolicitation remedy it seeks or that resolicitation would be the result of a successful challenge to the evaluation processes. It has focused entirely on the solicitation challenge and has not asserted that, even if it cannot press that challenge, it nevertheless is entitled to reversal of the denial of standing to press its evaluation challenges.

[6] "An issue that falls within the scope of the judgment appealed from but is not raised by the appellant in its opening brief on appeal" may properly be deemed waived. *Engel Indus., Inc. v. Lockformer Co.,* 166 F.3d 1379, 1383 (Fed.Cir.1999); *see Becton Dickinson & Co. v. C.R. Bard, Inc.,* 922 F.2d 792, 800 (Fed.Cir.1990). We see no reason to depart from that practice here.

AFFIRMED.

All Citations

779 F.3d 1376

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20 F.4th 759
United States Court of Appeals, Federal Circuit.

HARMONIA HOLDINGS GROUP, LLC, Plaintiff-Appellant
v.
UNITED STATES, Dev Technology Group, Inc., Defendants-Appellees

2020-1538
|
Decided: December 7, 2021

Synopsis

Background: Bidder filed pre- and post-award bid protest challenging evaluation of bids and award decision by Customs and Border Protection (CBP) for application development and operations and maintenance support services for cargo systems program directorate. Following intervention by awardee, as defendant-intervenor, the Court of Federal Claims, Loren A. Smith, Senior Judge, 146 Fed.Cl. 799, denied bidder's motion for judgment on the administrative record and granted awardee's cross-motion. Bidder appealed.

Holdings: The Court of Appeals, Reyna, Circuit Judge, held that:

[1] bidder did not waive its ability to file an action asserting the same grounds of objection that it asserted in its timely, formal pre-award protest to CBP, and

[2] bidder's challenge to Court of Federal Claims' decision that CBP did not act in an arbitrary or capricious manner in evaluating bidder's proposal and in making an award decision was moot.

Reversed in part, vacated in part, and remanded.

Procedural Posture(s): On Appeal; Motion for Judgment on Administrative Record; Review of Administrative Decision.

West Headnotes (7)

[1] **Federal Courts** Judgment

Court of Appeals reviews decisions by the Court of Federal Claims on cross-motions for judgment on the administrative record de novo, applying the same standard as the trial court.

[2] **United States** Judgment on administrative record

In deciding cross-motions for judgment on the administrative record, the Court of Federal Claims considers whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence of record.

[3] **Public Contracts** Scope of review
United States Scope of review

Bid protests are reviewed under Administrative Procedure Act (APA). 5 U.S.C.A. § 551 et seq.

[4] **Administrative Law and Procedure** Substantial evidence

Administrative Procedure Act's (APA) substantial evidence standard applies to trial court's review of agency's findings. 5 U.S.C.A. § 706(2)(E).

[5] **Federal Courts** "Clearly erroneous" standard of review in general

Where Court of Federal Claims makes factual findings from administrative record in first instance, Court of Appeals reviews such findings for clear error.

[6] **Public Contracts** Administrative procedures in general

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United States Administrative procedures in general

Bidder did not waive its ability to file an action asserting the same grounds of objection that it asserted in its timely, formal pre-award protest to Customs and Border Protection (CBP), regarding CBP's evaluation of bids for application development and operations and maintenance support services for cargo systems program directorate.

[7] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Bidder's challenge to Court of Federal Claims' decision that Customs and Border Protection (CBP) did not act in an arbitrary or capricious manner in evaluating bidder's proposal and in making an award decision for application development and operations and maintenance support services for cargo systems program directorate, was moot in light of remand to consider whether bidder was entitled to relief with respect to its pre-award bid protest; Court of Federal Claims, on remand, could determine that it was appropriate to reopen bidding and allow offerors to submit wholly new proposals, which would require a new technical evaluation by CBP.

***760** Appeal from the United States Court of Federal Claims in No. 1:19-cv-00674-LAS, Senior Judge Loren A. Smith.

Attorneys and Law Firms

Walter Brad English, Maynard, Cooper & Gale, PC, Huntsville, AL, argued for plaintiff-appellant. Also represented by Emily J. Chancey, Michael W. Rich.

David Michael Kerr, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by Deborah Ann Bynum, Jeffrey B. Clark, Robert Edward Kirschman, Jr.

William Shook, Law Offices of William A. Shook, PLLC, Washington, DC, argued for defendant-appellee Dev Technology Group, Inc. Also represented by Steven Barentzen, Law Office of Steven Barentzen, Washington, DC.

Before Reyna, Schall, and Wallach, * Circuit Judges.

Opinion

Reyna, Circuit Judge

Harmonia Holdings Group, LLC appeals a decision by the U.S. Court of Federal Claims granting the defendants United States and Dev Technology Group, Inc.'s Cross-Motion for Judgment on the Administrative Record. Harmonia contends that the Court of Federal Claims erred in determining that Harmonia waived its right to assert before the court the same challenges that it asserted in its preaward protest to U.S. Customs and Border Protection. We agree and reverse the Court of Federal Claims' decision on waiver; vacate the Court of Federal Claims' decision that Customs and Border Protection did not act in an arbitrary or capricious manner in evaluating Harmonia's proposal and in making an award decision; and remand for the Court of Federal Claims to determine in the first instance the merits of Harmonia's preaward protest to Customs and Border Patrol and what relief, if any, Harmonia is entitled to based on its preaward protest. Because the Court of Federal Claims could determine on remand that Harmonia is entitled to submit a wholly revised proposal requiring a new technical evaluation by Customs and Border Protection, we decline, on mootness grounds, to reach the merits of the Court of Federal Claims' decision with respect to Customs and Border Protection's technical evaluation of Harmonia's proposal submitted on November 13, 2018.

BACKGROUND

U.S. Customs and Border Protection ("CBP") is an agency within the U.S. Department of Homeland Security ("DHS") with a broad mandate to provide security at the nation's borders. *See, e.g.*, 6 U.S.C. § 211(c). CBP is a law enforcement organization charged with controlling and monitoring traffic at the borders, including the flow of vehicles, cargo, and people. *See id.*; *see also* J.A. 10292. CBP's Cargo Systems Program Directorate ("CSPD") manages a commercial trade processing system called the Automated Commercial Environment ("ACE"),

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which "helps reduce the Nation's ***761** vulnerability to changing threats without diminishing economic security, by providing threat awareness, prevention, and protection for the homeland." J.A. 10293. "ACE is the backbone of CBP trade processing and risk management activities and the key to implementing many of the agency's trade transformation initiatives." *Id.* ACE provides CBP and DHS automated tools and information for making admissibility decisions before shipments reach U.S. borders and supports cargo revenue collection. *Id.* Further, ACE "is not a single operating system but a collection of applications built on diverse multi-vendor technological platforms." *Id.* CPSD manages ACE by developing and deploying software code, maintaining existing system architecture, and developing new architecture to support the expanding ACE environment. *Id.*

The Competition

On July 12, 2018, CBP issued a solicitation requesting quotes for "application development and operation and maintenance support services" as part of CSPD's effort to develop and support cargo systems applications. J.A. 10292. The solicitation involved six tasks [1]: (1) Contractor Transition In; (2) Contractor Transition Out; (3) Cargo Systems Application Development; (4) Dev/Ops Configuration and Release Management; (5) IT System Security Analysis; and (6) Operations and Maintenance. J.A. 10297–307, 11274–87. The solicitation required each offeror to submit a proposal in two volumes, each containing certain specified information. *See* J.A. 10276–77.

The solicitation explained that the acquisition would be conducted in two phases. J.A. 10235. In Phase I, titled "Oral Presentations," CBP would seek to understand the offerors' responses to certain questions provided by CBP relating to CBP's requirements. *Id.* CBP would evaluate the Phase I responses "holistically with an overall adjectival quality rating" and advise the offerors of their likelihood of being selected. J.A. 10280–81. The intent of this procedure was "to minimize proposal development costs for those [o]fferors with little or no chance of receiving an award." J.A. 10235. Nevertheless, notwithstanding CBP's advice at Phase I, all offerors that participated in Phase I could participate in Phase II. *Id.*

In Phase II, titled "Written Responses," CBP would evaluate the offerors' proposals in accordance with certain evaluation criteria and could make an award without negotiations to the proposal deemed the best value to the government. *Id.* The evaluation criteria included five factors:

- Factor 1: Technical Excellence
  - Sub-Factor 1: Tasks 3, 4, and 6
  - Sub-Factor 2: Task 5
  - Sub-Factor 3: Risk Mitigation Plan
- Factor 2: Management Approach
  - Sub-Factor 1: Staffing Plan/Key Personnel
  - Sub-Factor 2: Program Management
  - Sub-Factor 3: Sub-Contracting Management/Teaming Plan
- Factor 3: Quality Assurance
  - Sub-Factor 1: Transition-In Plan
  - Sub-Factor 2: Transition-Out Plan
- Factor 4: Past Performance
- Factor 5: Price

***762** J.A. 10281–85, 13062–63. The solicitation also explained that the factors decreased in importance from factor 1 to factor 5:

> Factor 1 is more significantly important than Factors 2, 3, and 4; Factors 2 and 3 are of equal importance and significantly more important than Factor 4. The sub-factors are hereby described as follows: all sub-factors within Factors 1, 2 and 3 are of equal importance to the other sub-factors within the same Factor. The non-Price Factors, when combined, are significantly more important than the Price Factor (Factor 5).

J.A. 10286.

For Factors 1–3, the solicitation explained that CBP would assess whether each offeror's proposal "exhibit[ed]

a thorough understanding of the complexity and magnitude of the requirement and [the] likelihood that the [o]fferor will be successful in performance under each tasking of the [statement of work].” *Id.* CBP would assign an overall adjectival rating for each of the three factors and assign a risk rating for each of their sub-factors. *Id.* “[I]f an [o]fferor receives a high risk rating, regardless of technical ratings or price, that [o]fferor may not be considered for award.” *Id.* For Factor 4, CBP would assess performance risk. *Id.*

For Factor 5 relating to price, the solicitation stated that CBP would “evaluate [p]rice [p]roposals to ensure prices are fair and reasonable,” and that “[t]he importance of price may increase as the differences between [o]fferor[s'] non-price factors decrease[ ].” J.A. 10287. The solicitation provided a sample price format and required offerors to submit pricing for the contract line items (“CLINs”) listed in the spreadsheet. J.A. 10277, 10334–42. The sample price format explained how the tasks tied into Time and Materials (“T&M”) CLINs, and it showed four CLINs each having a list of pertinent job titles. J.A. 10334–42. The four CLINs included (1) Base Development CLIN 001 T&M, (2) On-Demand Services Department CLIN 002 T&M, (3) Base [Operations & Management (“O&M”)] CLIN 003 T&M, and (4) On-Demand Services O&M CLIN 004 T&M. *Id.* Taken together, the four CLINs listed over 90 labor categories. *See id.* The solicitation specified that offerors must provide labor rates that are “fully-burdened to include all direct and indirect costs and profit,” and that the awardee must, “when so ordered by the Government, provide the necessary management, labor, facilities, materials and supplies to perform tasks as stated in the task order contract.” J.A. 10237. Additionally, in a section titled “Task Order Terms and Conditions,” the solicitation provided for “Surge CLIN Volume,” meaning that CBP could purchase additional services during the performance period. J.A. 10270.

From July through mid-September of 2018, CBP issued eight amendments to the solicitation. In late September 2018, Appellant Harmonia Holdings Group, LLC (“Harmonia”), Appellee Dev Technology Group, Inc. (“Dev Tech”), and other offerors submitted their initial proposals. J.A. 11699–2452.

On October 26, 2018, CBP issued Amendment 9. Amendment 9 altered the period of performance, J.A. 11576; clarified the procedures for “Surge” CLIN purchasing, J.A. 11593; revised Factor 2, Sub-factor 1, by requiring offerors to “provide a detailed Staffing Plan when the On-Demand/Surge CLINs are needed,” J.A. 11589; altered Factor 5 by requiring offerors to conform their respective staffing plans under Factor 2, Sub-factor 1, to their price quotations, J.A. 11593–94; provided a new sample price format spreadsheet that required offerors to resubmit pricing to comply with new CLIN pricing rules, J.A. 11593, 11637; and reduced the number of ***763** labor categories from 90 to 10, J.A. 11637, 11475.

On November 1, 2018, CBP issued Amendment 10. Amendment 10 added Task 4 to CLIN 003, J.A. 11696, 11637; established estimated ceilings for CLINs 001, 002, and 004, J.A. 11694; designated CLINs 001 and 003 as “Required Services,” i.e., work needed at time of award, *id.*; and added FAR 52.219-14 Limitations on Subcontracting (Jan. 2017), J.A. 11645.

Offerors' proposal revisions in response to Amendments 9 and 10 were due on November 13, 2018. J.A. 11537. CBP specified in both Amendments that offerors would be permitted to revise their proposals with respect to Factor 2, Sub-factor 1 (Staffing Plan/Key Personnel), and Factor 5 (Price). J.A. 11537, 11638.

On November 12, 2018, Harmonia submitted a preaward agency-level protest to CBP. J.A. 12490–94. Harmonia challenged CBP's limitation of revisions to Factor 2, Sub-factor 1, and Factor 5, arguing that offerors should be able to update their entire proposals in response to Amendments 9 and 10. J.A. 12491–93. Harmonia also challenged Amendment 10's addition of FAR 52.219-14 Limitations on Subcontracting (Jan. 2017), which prohibited offerors from subcontracting more than 50 percent of the work, as a material change warranting “major revisions” to offerors' proposals. Appellant's Br. 9; *see also* J.A. 12493. The next day, November 13, 2018, Harmonia submitted to CBP a proposal with revisions for Factor 2, Sub-factor 1, and Factor 5. J.A. 12561–658.

On December 6, 2018, CBP denied Harmonia's protest. CBP rejected Harmonia's argument that offerors should be able to update their entire proposals in response to Amendments 9 and 10, explaining that those amendments were intended to merely give offerors “additional flexibility towards pricing,” “did not change the overall technical solution to be performed,” and did not “constitute[ ] a material change to the solicitation.” J.A. 12899. CBP also explained that FAR 52.215-1, which Harmonia cited as permitting offerors to update their entire proposals, in fact “d[id] not apply to this procurement conducted in accordance with

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FAR Part 8." J.A. 12900. Regarding CBP's limitation on sub-contracting under FAR 52.219-14, CBP stated that it would "proceed with evaluations treating all [o]fferors with neutrality regarding compliance with this clause." J.A. 12899.

In a memorandum revised on April 23, 2019, CBP performed a comparative analysis of the proposals and stated that "Dev Tech is more highly ranked than Harmonia, which is considered the lowest ranked technical solution." J.A. 13052. The memorandum further indicated that Harmonia would not be considered in CBP's tradeoff analysis. *Id.*

In an April 25, 2019 letter, CBP informed Harmonia that its proposal was unsuccessful, that a proposal revision would not be considered, and that Dev Tech had won the contract because it had submitted the proposal representing the best value to the government. J.A. 13060. CBP also informed Harmonia of the evaluation results, summarized in the following chart:

***764**

Factor 1 - Technical Excellence	**Sat/Low**	Sub-Factor 1 - SoW Task 3, 4, 6 *Sat/Med*	Sub-Factor 2 - SoW Task 5 *Sat/Low*	Sub-Factor 3 - Risk Mitigation Plan *Sat/Low*
Factor 2 - Management Approach	**Marginal/High**	Sub-factor 1 - Staffing Plan/Key Personnel Resumes *Marginal/High*	Sub-factor 2 - Program Management Approach *Marginal/High*	Sub-factor 3 - Subcontractor Management Plan/ Teaming Arrangements *Sat/Med*
Factor 3 - Quality Assurance	**Marginal/ Medium**	Sub-factor 1 - Transition In Plan (Task 1) *Marginal/High*	Sub-factor 2 - Transition Out Plan (Task 2) *Sat/Low*	
Factor 4 - Past Performance	**Sat/Low**			

J.A. 13063.

For each sub-factor, the chart showed CBP's overall adjectival rating (e.g., "Sat," i.e., Satisfactory, or "Marginal"), followed by the risk level (e.g., "Med," i.e., Medium, "High," or "Low"). According to CBP's evaluation, Harmonia received high-risk ratings for three sub-factors: Factor 2, Sub-factor 1 (Staffing Plan/Key Personnel Resumes); Factor 2, Sub-factor 2 (Program Management Approach); and Factor 3, Sub-factor 1 (Task 1, Transition In Plan). *See id.* For all three sub-factors, CBP explained that Harmonia's proposal omitted certain "critical applications" that are "major areas of functionality in O&M": Cargo Release, Foreign Trade Zone ("FTZ"), International Trade Data System ("ITDS"), or Automated Export System ("AES"). J.A. 13064–65. Regarding Factor 5 (price), CBP also stated that the estimated total price for Harmonia's proposal was approximately $10 million greater than that of Dev Tech's proposal. *See* J.A. 13065, 13060.

The Court of Federal Claims

On May 7, 2019, Harmonia filed a bid protest with the U.S. Court of Federal Claims. *Harmonia Holdings Grp., LLC v. United States*, 146 Fed. Cl. 799, 809 (2020); J.A. 27. In its protest, Harmonia challenged CBP's December 6, 2018 denial of Harmonia's November 12, 2018 pre-award protest. *See* *Harmonia*, 146 Fed. Cl. at 810, 813. Harmonia also challenged CBP's evaluation of the proposal Harmonia submitted on November 13, 2018. In June 2019, the parties briefed their cross-motions for judgment on the administrative record and Dev Tech's motion to dismiss. *Id.* at 809; J.A. 27–28. The Court of Federal Claims held oral argument on October 3, 2019. *Harmonia*, 146 Fed. Cl. at 810; J.A. 31.

On January 16, 2020, the Court of Federal Claims issued a decision on the parties' motions. The court first denied Dev Tech's motion to dismiss and found that Harmonia had proven standing by showing it had a substantial chance of winning the contract. *Harmonia*, 146 Fed. Cl. at 811–12. The Court of Federal Claims then denied Harmonia's motion for judgment on the administrative record and granted Dev

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Tech's cross-motion. The court first addressed Harmonia's bid protest insofar as it involved the same grounds raised in its pre-award protest to the CBP, i.e., the CBP's limitation on proposal revisions following Amendments 9 and 10. *Id.* at 812–14. The court determined that Harmonia's bid protest on these grounds failed for untimeliness. *Id.* It quoted and relied on the following language from *COMINT Systems Corp. v. United States*, 700 F.3d 1377, 1382 (Fed. Cir. 2012), while recognizing that *COMINT* involved different facts:

> To be sure, where bringing the challenge prior to the award is not practicable, it may be brought thereafter. But, ***assuming that there is adequate time in which to do so***, a disappointed bidder must bring a challenge to a solicitation ***765** containing a patent error or ambiguity ***prior to the award of the contract***.

Harmonia, 146 Fed. Cl. at 813 (emphasis in original). The court observed that "[n]othing in the record or in plaintiff's briefing meaningfully explains the five-month delay in Harmonia filing its pre-award protest with this Court." *Id.* at 814. Given that delay, the court explained that it "cannot conclude that Harmonia diligently or timely pursued its position." *Id.* The court further explained, "Had Harmonia timely filed a pre-award protest with the GAO or this Court after its agency-level protest was denied, it would have avoided asking the Court to concurrently resolve both pre- and post-award protest grounds months after the Agency's award decision." *Id.* The court concluded that, "while Harmonia facially met the requirements under *Blue & Gold*, Harmonia nevertheless waived its right to bring those claims before this Court by failing to timely and diligently pursue its objections to Amendments 9 and 10." *Id.*

The Court of Federal Claims then addressed Harmonia's post-award challenges to CBP's evaluation of Harmonia's proposal under Factors 1–3[2] and its resulting decision to award the contract to Dev Tech. *See* *id.* at 814–17. Harmonia had argued that the CBP's evaluation with respect to Factor 2, Sub-factor 1 (Staffing Plan/Key Personnel Resumes) and Sub-factor 2 (Program Management Approach) was "irrational." According to Harmonia, "there can be no doubt" that its proposal was responsive to the solicitation's requirements. *Id.* at 815 (citation omitted). Harmonia contended that the CBP "unreasonably ignor[ed] [the] context" of Harmonia's "proposal description of its responsibility for ITDS and Cargo Release." *Id.* (citation omitted). Harmonia further argued that the CBP assigned undue importance to previously-unstated "[c]ore functional areas" of the work, including Cargo Release, FTZ, ITDS, and AES. *Id.*

The Court of Federal Claims rejected these arguments because the solicitation made clear that the applications not addressed in Harmonia's proposal were a necessary part of the services being procured. *Id.* at 816. And, given the technical nature of the services at issue, the court declined to substitute its judgment for that of the CBP. *Id.*

Harmonia also challenged the CBP's high-risk evaluation of its proposal under Factor 3, Sub-factor 1 (Task 1, Transition In Plan). Harmonia contended that the solicitation merely required offerors to outline their approaches to "taking full ownership of the requirements" and that "there was no requirement to discuss any applications." *Id.* at 816–17 (citation omitted). Harmonia further contended that it met the solicitation's requirements by "specifically mention[ing]" the Cargo Release, ITDS and AES applications. *Id.* at 817 (citation omitted). The Court of Federal Claims rejected Harmonia's arguments, agreeing instead with Dev Tech that the solicitation specifically required those applications and that Harmonia's mere mention of them in its proposal supported CBP's high-risk evaluation under Factor 3, Sub-factor 1. *Id.* (citations omitted). The Court of Federal Claims determined that, based on its high-risk ratings with respect to Factor 2, Sub-factors 1–2, and Factor 3, Sub-factor 1, "Harmonia was ineligible for award ... in accordance with the terms of the Solicitation." *Id.*

***766** Harmonia appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

STANDARD OF REVIEW

[1] **[2]** We review decisions by the Court of Federal Claims on cross-motions for judgment on the administrative record de novo, applying the same standard as the trial court. *XOtech, LLC v. United States*, 950 F.3d 1376, 1379 (Fed. Cir. 2020). In deciding cross-motions for judgment on the administrative record, the Court of Federal Claims considers "whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence of record." *Id.* (quoting *Palantir USG, Inc. v. United States*, 904 F.3d 980, 989 (Fed. Cir. 2018)).

[3] **[4]** **[5]** "Bid protests are reviewed under the Administrative Procedure Act." *XOtech*, 950 F.3d at 1380. Therefore, an agency action may be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." *Palantir*, 904 F.3d at 989 (quoting 5 U.S.C. § 706(2)(A), (D)). The substantial evidence standard of 5 U.S.C. § 706(2)(E) applies to a trial court's review of an agency's findings. *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1312 (Fed. Cir. 2007). However, where the Court of Federal Claims makes factual findings from the administrative record in the first instance, we review such findings for clear error. *Id.*

DISCUSSION

Harmonia contends that the Court of Federal Claims erred in determining that Harmonia waived its right, under *Blue & Gold* and its progeny, to file an action in the Court of Federal Claims asserting the same challenges that it asserted in its preaward protest to the CBP, which the CBP denied five months earlier. Appellant's Br. 11–13, 15–18. Harmonia contends that the Court of Federal Claims improperly extended the law of *Blue & Gold* by finding waiver even though Harmonia had formally pre-served its challenge by timely submitting its pre-award bid protest to CBP. *Id.* Under the proper application of the law, Harmonia argues, it did not waive, and thus should be permitted to pursue in the Court of Federal Claims, its challenge to CBP's limitation on offerors' revisions of their proposals following Amendments 9 and 10. *Id.* Dev Tech and the government argue that *Blue & Gold* waiver should apply, even though Harmonia timely submitted a formal pre-award protest to CBP, because of Harmonia's delay in filing an action following CBP's denial of its pre-award protest. We agree with Harmonia.

The statute establishes a six-year period following claim accrual during which a party may file suit in the Court of Federal Claims. 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."). In *Blue & Gold*, however, we restricted the time for bringing a bid protest in the Court of Federal Claims to a shorter period. Specifically, we held that

> a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.

Blue & Gold, 492 F.3d at 1313. We explained that this waiver rule prevents a bidder who is aware of a solicitation defect from waiting to bring its challenge after the award in an attempt to restart the bidding process, "perhaps with increased knowledge of its competitors." *Id.* at 1314. ***767** "A waiver rule thus prevents contractors from taking advantage of the government and other bidders[ ] and avoids costly after-the-fact litigation." *Id.*

Subsequently, in *COMINT*, we expanded the reasoning of *Blue & Gold* to encompass waiver based on delay that occurs after the close of bidding, given that the amendment in that case was adopted after that time. 700 F.3d at 1382. In *COMINT*, we explained that "[t]here is no question that Comint could have challenged the solicitation before the award." *Id.* The protesting party there "d[id] not claim to have been unaware of the alleged defect in Amendment 5 prior to the award of the contract," and it had two and a half months before the award in which to file its protest.

Id. at 1382–83. We concluded that "[t]hat was more than an adequate opportunity to object," and that it was improper for Comint to seek to restart the bidding process by objecting to Amendment 5 for the first time after the award. *Id.* at 1383.

[6] Our cases concluding that *Blue & Gold* waiver applies generally involve a failure to timely object to a known, patent defect in the solicitation. We are not persuaded that our precedent supports applying the *Blue & Gold* waiver rule to this case as the Court of Federal Claims did. In *Bannum, Inc. v. United States*, we explained that "a formal, agency-level protest before the award would likely preserve a protestor's post-award challenge to a solicitation ... as might a pre-award protest filed with the GAO." 779 F.3d 1376, 1380 (Fed. Cir. 2015). We therefore recognized that the *Blue & Gold* waiver rule is predicated not only on the notion of avoiding delay that could benefit the delaying party, but also on the notion of preserving challenges and providing notice to interested parties. *See id.* Harmonia's undisputedly timely, formal challenge of the solicitation before CBP removes this case from the ambit of *Blue & Gold* and its progeny. Therefore, we reverse the Court of Federal Claims' decision that Harmonia waived, under *Blue & Gold*, its ability to file an action asserting the same grounds of objection that it asserted in its earlier, formal protest before CBP. We remand the case to the Court of Federal Claims for consideration of the pre-award protest that the court previously erroneously denied on *Blue & Gold* grounds. *Harmonia*, 146 Fed. Cl. at 812–14.

Our opinion should not be read as condoning delay in filing actions in the Court of Federal Claims. Under certain circumstances, delaying bidders may face adverse consequences, but we are not persuaded in this case that imposition of a *Blue & Gold* waiver should be one of those consequences. The Court of Federal Claims has relatively broad authority under 28 U.S.C. § 1491(b)(2) to fashion a remedy: the court may "award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs." On remand, the Court of Federal Claims might decide under the circumstances of this case that injunctive relief is appropriate.

[7] Harmonia seeks to submit "a fully revised proposal in response to the changed requirements in Amendments 9 and 10." Appellant's Br. 28. Recognizing that the Court of Federal Claims, on remand, could determine that it is appropriate to reopen bidding and allow offerors to submit wholly new proposals, which would require a new technical evaluation by CBP, we vacate the Court of Federal Claims' decision with respect to CBP's technical evaluation of Harmonia's November 13, 2018 proposal on mootness grounds and do not reach its merits. *See* ***768** *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 939 (Fed. Cir. 2007) ("When, during the course of litigation, it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should generally be dismissed."). To the extent that the Court of Federal Claims determines on remand that Harmonia is not entitled to submit a wholly revised proposal, the Court of Federal Claims may decide to reinstate its decision that CBP's technical evaluation was rational.

CONCLUSION

We hold that the Court of Federal Claims erred in determining that Harmonia waived, under *Blue & Gold*, its right to assert the same challenges that it asserted in its pre-award bid protest before CBP. We therefore reverse the Court of Federal Claims' waiver decision and vacate its decision that CBP did not act in an arbitrary and capricious manner in evaluating Harmonia's proposal and making an award decision. We remand for the Court of Federal Claims to determine in the first instance whether Harmonia is entitled to relief with respect to its pre-award bid protest. We have considered the parties' remaining arguments and find them unpersuasive.

REVERSED-IN-PART, VACATED-IN-PART AND REMANDED

COSTS

No costs.

All Citations

20 F.4th 759

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Footnotes

* Circuit Judge Evan J. Wallach assumed senior status on May 31, 2021.

1 The original solicitation included seven tasks, but Amendment 4 dated September 7, 2018, eliminated one task and renumbered the tasks prior to the parties' submission of their initial proposals. *See* J.A. 11274.

2 The Court of Federal Claims declined to reach the merits of Harmonia's arguments with respect to Factor 1 in light of its findings that the CBP did not irrationally assign Harmon's proposal high-risk evaluations with respect to Factor 2, Sub-factors 1 and 2 and Factor 3, Sub-factor 1. *Id.* at 817.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Amazon Web Services, Inc. v. United States, Fed.Cl., April 29, 2021

961 F.3d 1343
United States Court of Appeals, Federal Circuit.

INSERSO CORPORATION, Plaintiff-Appellant
v.
UNITED STATES, Defendant-Appellee
FEDITC, LLC, Riverside
Engineering, LLC, Defendants

2019-1933
|
Decided: June 15, 2020

Synopsis

Background: Small-business bidder filed post-award bid protest against United States, challenging Defense Information Systems Agency's (DISA) award of information technology (IT) services contracts after DISA disclosed information to bidders during debriefing for full-and-open portion of competition that gave them unfair competitive advantage over other bidders in pending small-business portion of competition, allegedly in violation of procurement regulations due to organizational conflict of interest (OCI) and disparate treatment of bidders. The Court of Federal Claims, Loren A. Smith, Senior Judge, 142 Fed.Cl. 678, granted government judgment on administrative record. Bidder appealed.

[Holding:] The Court of Appeals, Taranto, Circuit Judge, held that bidder forfeited right to challenge unequal disclosure.

Vacated and remanded.

Reyna, Circuit Judge, filed dissenting opinion.

Procedural Posture(s): On Appeal; Review of Administrative Decision; Motion for Judgment on Administrative Record.

West Headnotes (13)

[1] **Public Contracts** Parties; standing
United States Parties; standing

Under the Tucker Act, Court of Federal Claims has jurisdiction to render judgment on an action by an interested party objecting to a solicitation or contract award made by a federal agency. 28 U.S.C.A. § 1491(b).

[2] **Federal Courts** Questions of Law in General
Federal Courts "Clearly erroneous" standard of review in general

Court of Appeals reviews the Court of Federal Claims' legal conclusions de novo and its factual findings for clear error.

[3] **Public Contracts** Scope of review
United States Scope of review

When making a prejudice analysis for a post-award bid protest challenging a federal procurement in the first instance, Court of Federal Claims is required to make factual findings.

[4] **Public Contracts** Scope of review
United States Scope of review

Whether the Court of Federal Claims applied the appropriate legal standard to its factual findings in a post-award bid protest challenging a federal procurement is a question of law.

1 Cases that cite this headnote

[5] **Public Contracts** Administrative procedures in general
United States Administrative procedures in general

A party who has opportunity to object to the terms of a government solicitation containing

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a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims; this reasoning applies to all situations in which the protesting party had the opportunity to challenge a solicitation before the award and failed to do so.

10 Cases that cite this headnote

[6] **Public Contracts** In general; advertising

United States In general; advertising

A defect in a federal solicitation is "patent" if it is an obvious omission, inconsistency, or discrepancy of significance.

3 Cases that cite this headnote

[7] **Public Contracts** In general; advertising

United States In general; advertising

A defect in a federal solicitation is "patent" if it could have been discovered by reasonable and customary care.

4 Cases that cite this headnote

[8] **Federal Courts** Public contracts

Whether an ambiguity or defect in a federal solicitation is patent is an issue of law reviewed de novo.

[9] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

The waiver rule, providing that a party who has opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims, is established under a specific statutory authorization, namely, the congressional command that bid protest jurisdiction under the Tucker Act be exercised with due regard to the need for expeditious resolution of the action, with support from longstanding substantive contract law and from regulations under a related statutory regime specific to bid protests. 28 U.S.C.A. § 1491(b)(3).

7 Cases that cite this headnote

[10] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Small business bidder forfeited its right to object to Defense Information Systems Agency's (DISA) unequal disclosure of information to bidders during debriefing for full-and-open portion of competition that gave those bidders unfair competitive advantage over other bidders in pending small-business portion of competition for contracts to provide information technology services; bidder knew, or should have known, that DISA would disclose competitive information to bidders in full-and-open competition at time of, and shortly after, notification of awards in that competition, but bidder failed to object to solicitation for at least four months until after small-business competition awards were made. 4 C.F.R. § 21.2(a)(2); 48 C.F.R. §§ 15.503(b)(1)(iv), 15.506(a)(2), 15.506(d).

1 Cases that cite this headnote

[11] **Public Contracts** Application of General Rules of Construction in General

United States Application of General Rules of Construction in General

Offerors in a federal government solicitation are charged with knowledge of law and fact appropriate to the subject matter.

1 Cases that cite this headnote

[12] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

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Under the waiver rule, interested bidders need to call the federal procuring agency's attention to solicitation problems of which they reasonably should be aware.

[13] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

The waiver rule, providing that a party who has opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims, serves the interest in reducing the need for the inefficient and costly process of agency rebidding after offerors and the agency have expended considerable time and effort submitting or evaluating proposals in response to a defective solicitation.

10 Cases that cite this headnote

***1345** Appeal from the United States Court of Federal Claims in No. 1:18-cv-01655-LAS, Senior Judge Loren A. Smith.

Attorneys and Law Firms

Richard P. Rector, DLA Piper LLP (US), Washington, DC, for plaintiff-appellant. Also represented by Dawn Stern; Carl Bradford Jorgensen, Austin, TX.

Anthony F. Schiavetti, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant-appellee. Also represented by Joseph H. Hunt, Robert Edward Kirschman, Jr., Douglas K. Mickle.

Before Reyna, Mayer, and Taranto, Circuit Judges.

Opinion

Dissenting opinion filed by Circuit Judge Reyna.

Taranto, Circuit Judge

The United States Defense Information Systems Agency (DISA), which is part of the U.S. Department of Defense, awarded contracts to multiple firms that bid for the opportunity to sell information technology services to various federal government agencies. Inserso Corporation unsuccessfully competed to be one of the firms awarded a contract. In an action filed against the United States in the Court of Federal Claims, Inserso alleged that DISA disclosed information to certain other bidders but not Inserso, giving the rival bidders an unfair competitive advantage. The Court of Federal Claims held that DISA's disclosure did not prejudice Inserso in the competition and on that basis entered judgment in favor of the government. ***1346** *Inserso Corp. v. United States*, 142 Fed. Cl. 678 (2019).

We agree that judgment in favor of the government is appropriate, but on a different ground. We conclude that, because Inserso did not object to the solicitation when it was unreasonable to disregard the high likelihood of the disclosure at issue, Inserso forfeited its ability to challenge the solicitation in the Court of Federal Claims. We do not reach the prejudice portion of the court's decision. We therefore vacate that decision and remand for the court to enter judgment consistent with this opinion.

I

On March 2, 2016, DISA publicly posted Solicitation No. HC1028-15-R-0030 (Encore III). The solicitation invited firms to bid for the opportunity to enter into indefinite-delivery/indefinite-quantity contracts under which the awardees would provide information-technology services to the Department of Defense and other federal agencies. The solicitation states that the contracts would involve fixed-price and cost-reimbursement task orders and that awards of contracts would be made to offerors whose proposals provided the best value to the government and satisfied the evaluation criteria.

The solicitation lists three criteria for evaluating proposals: (1) the bidder's technical/management approach, (2) the bidder's past performance, and (3) cost/price information. For the evaluation of price, the solicitation states, DISA would calculate a "total proposed price" and a "total evaluated price." J.A. 101918. The total proposed price would be calculated by applying government-estimated labor hours for each year of contract performance to each offeror's proposed fixed-price and cost-reimbursement labor rates;

in turn, the total evaluated price would be calculated by adjusting any cost-reimbursement rates that DISA determined were unrealistic. The proposals with the lowest total evaluated price would then be evaluated for compliance with the other terms of the solicitation.

DISA divided the Encore III competition into two competitions. One competition would award a "suite" of contracts in a "full and open" competition; the other would award a suite of contracts to small businesses. J.A. 101891. DISA anticipated awarding up to twenty contracts in each competition.

Importantly, the solicitation expressly states that small businesses could compete in both competitions but could receive only one award. J.A. 101892. The solicitation also provides that firms could compete through joint ventures or partnerships. J.A. 101907. Under those provisions, several firms that bid in the small-business competition in fact also competed in the full-and-open competition as part of joint ventures. Inserso competed only in the small-business competition.

Bidders in both competitions submitted their proposals by October 21, 2016. But the timing of the two competitions quickly diverged. On November 2, 2017, DISA notified successful and unsuccessful bidders in the full-and-open competition of their award status. By November 8, 2017, *i.e.*, less than a week later, DISA completed the debriefing process by which it discloses certain details of the agency's selection decision to winners and losers. *See* 48 C.F.R. § 15.506.

DISA had not yet completed evaluating the proposals submitted in the separate small-business competition and was still communicating with bidders in that competition. By October 18, 2017, DISA had received responses to the first round of evaluation notices it had sent to small-business ***1347** bidders. Even after November 2, 2017, DISA sent several more rounds of evaluation notices to small-business bidders. DISA did not request final proposal revisions from the small-business bidders until April 2018. *See* 48 C.F.R. § 15.307. Ultimately, such bidders had until June 20, 2018, to submit their final revised proposals for the small-business competition.

DISA notified successful and unsuccessful bidders of its award decisions for the small-business suite on September 7, 2018. Inserso did not receive an award because its total evaluated price was the 23rd lowest in a competition for twenty slots. DISA attached a debriefing document to its notice to Inserso. The debriefing included—among other things—the total evaluated price for the twenty awardees and some previously undisclosed information on how DISA had evaluated the cost element of the proposals.

In response to its debriefing, Inserso sent follow-up communications to DISA. Inserso noted that several awardees in the small-business competition had also competed in the full-and-open competition as part of joint ventures or partnerships, and it asked whether those entities had received similarly detailed debriefings at the conclusion of the full-and-open competition (in fall 2017). Inserso expressed concern that, if so, the earlier debriefing would have provided unequal information giving a competitive advantage to some of the bidders in the pending small-business competition. In response, DISA stated that all unsuccessful bidders in both competitions were given similarly detailed information in their debriefings.

On September 12, 2018, Inserso filed a protest in the United States Government Accountability Office (GAO). *See* 4 C.F.R. §§ 21.1–21.2. On October 17, 2018, GAO dismissed Inserso's protest because another party was challenging the same solicitation at the Court of Federal Claims. *See id.*, § 21.11(b).

On October 25, 2018, Inserso filed its own complaint in the Court of Federal Claims, alleging that the full-and-open debriefing gave certain offerors in the small-business competition a competitive advantage by providing them, but not other bidders, the total evaluated price for all full-and-open awardees and previously undisclosed information regarding DISA's evaluation methodology. Inserso alleged that this unequal provision of information created an organizational conflict of interest in violation of 48 C.F.R. §§ 9.504, 9.505 and, in addition, violated at least one regulation specifically addressed to disparate treatment of bidders, 48 C.F.R. § 1.602-2(b). Inserso moved for judgment on the administrative record, and the government opposed Inserso's motion and cross-moved for judgment on the administrative record.

The Court of Federal Claims ruled in favor of the government. Without definitively finding a violation, the court recognized that the challenged disclosure of information might have violated the identified regulatory standards, stating in particular that the total evaluated prices of the winners of the full-and-open competition "provided a useful comparison

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tool that [small-business-competition] offerors could utilize as a benchmark in revising their price proposals." *Inserso*, 142 Fed. Cl. at 684. The court also stated that "[p]rejudice is presumed once a potentially significant [organizational conflict of interest] is identified." *Id.* Here, however, the court concluded, the government demonstrated lack of prejudice to Inserso, a conclusion that defeated Inserso's claim as to both sets of regulations at issue. *Id.* at 684–85. The court entered judgment on April 2, 2019. J.A. 6.

***1348** Inserso timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II

On appeal, Inserso argues that the Court of Federal Claims erred in its treatment of the presumption of prejudice, including in its determination that the government rebutted such a presumption. Inserso also argues that, even apart from a presumption of prejudice, it was entitled to a finding that it was prejudiced by the challenged unequal disclosure. The government—in addition to defending the trial court's analysis—argues in this court, as it did in the trial court, that Inserso forfeited its right to challenge DISA's disclosure by not raising the issue in a timely manner.

[1] **[2]** **[3]** **[4]** Under 28 U.S.C. § 1491(b), the Court of Federal Claims has "jurisdiction to render judgment on an action by an interested party objecting to" a solicitation or contract award made by a federal agency. We review the Court of Federal Claims' legal conclusions de novo and its factual findings for clear error. *Daewoo Eng'g & Constr. Co. v. United States*, 557 F.3d 1332, 1335 (Fed. Cir. 2009). "When making a prejudice analysis in the first instance, [the Court of Federal Claims] is required to make factual findings." *Bannum, Inc. v. United States*, 404 F.3d 1346,1357 (Fed. Cir. 2005). Whether the court applied the appropriate legal standard to its factual findings is a question of law. *See Shell Oil Co. v. United States*, 688 F.3d 1376, 1381 (Fed. Cir. 2012).

A

Inserso alleges that DISA violated two sets of regulations that are part of the Federal Acquisition Regulation (FAR). *First*, it alleges that DISA violated FAR subpart 9.5, which directs contracting officers to avoid, neutralize, or mitigate "organizational conflicts of interest." 48 C.F.R. § 9.505. Section 9.505 describes the dual aims of "[p]reventing the existence of conflicting roles that might bias a contractor's judgment" and "[p]reventing unfair competitive advantage." *Id.*, § 9.505(a), (b). An unfair competitive advantage can exist when a contractor possesses "[p]roprietary information that was obtained from a Government official without proper authorization" or "[s]ource selection information (as defined in [48 C.F.R. §] 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract." *Id.*, § 9.505(b). *Second*, Inserso alleges that DISA failed to treat it fairly and equally, as required by several provisions of the FAR. *See*, *e.g.*, *id.*, §§ 1.102(b)(3), 1.602-2(b), 3.101-1.

Both of Inserso's regulatory arguments arise from the same underlying DISA action, having the same alleged wrongful effect on the small-business competition. Specifically, both arguments challenge the disclosure of certain information to firms that (directly or through partnerships or joint ventures) bid for the full-and-open suite of contracts when some of those firms (directly or through partnerships or joint ventures) were still preparing bids for the small-business suite. Because "the scope of work and evaluation factors are nearly identical for each suite," *Inserso*, 142 Fed. Cl. at 684, and the information was relevant to the evaluation of bids, Inserso alleges, DISA's failure to disclose that same information to all bidders in the small-business competition gave those bidders with the information an unfair competitive advantage.

Inserso focuses on two categories of disclosed information: (1) the total evaluated prices of those firms which won contracts in the full-and-open competition; and (2) ***1349** details of how DISA evaluated the costs built into the proposals made by bidders in that competition. Inserso contends, and the trial court recognized, that knowledge of the winning total evaluated prices from the full-and-open competition would provide a small-business-competition bidder a target range in which it could be confident that it would win an award. Inserso also contends that the cost-evaluation information would have been useful to a small-business-competition bidder who was considering how to reduce the price of its bid in a way that DISA would find acceptable.

Inserso, however, did not object to the disparity in provision of competitively advantageous information until after the awards were made in the small-business competition. We conclude that, by waiting until the awards were made, Inserso forfeited the objection.

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B

[5] In *Blue & Gold Fleet, L.P. v. United States*, we held that "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims." 492 F.3d 1308, 1313 (Fed. Cir. 2007). We have since held that this reasoning "applies to all situations in which the protesting party had the opportunity to challenge a solicitation before the award and failed to do so." *COMINT Systems Corp. v. United States*, 700 F.3d 1377, 1382 (Fed. Cir. 2012). The Court of Federal Claims has correctly applied this rule in organizational-conflict-of-interest cases, including cases dealing with the disclosure of pricing information during debriefing. *See Ceres Envtl. Services, Inc. v. United States*, 97 Fed. Cl. 277, 310 (2011).

[6] **[7]** **[8]** **[9]** A defect in a solicitation is patent if it is an obvious omission, inconsistency, or discrepancy of significance. *Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1312 (Fed. Cir. 2016). Additionally, a defect is patent if it could have been discovered by reasonable and customary care. *Id.* at 1313; *see also K-Con, Inc. v. Secretary of Army*, 908 F.3d 719, 722 (Fed. Cir. 2018) ("A patent ambiguity is present when the contract contains facially inconsistent provisions that would place a reasonable contractor on notice."). "Whether an ambiguity or defect is patent is an issue of law reviewed de novo." *Per Aarsleff*, 829 F.3d at 1312. [1]

[1] The dissent, but not Inserso, suggests that this court's *Blue & Gold* line of authority has been superseded by the Supreme Court's decision in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, —— U.S. ——, 137 S. Ct. 954, 197 L.Ed.2d 292 (2017). We do not read *SCA Hygiene* as having the broad implication that the dissent suggests but rather as holding only that the general non-statutory equitable timeliness doctrine of laches does not override the congressionally enacted statute of limitations applicable to legal actions for damages. 137 S. Ct. at 959–67. *Blue & Gold*, in contrast, establishes a "waiver rule" under a specific statutory authorization —the congressional command that bid-protest jurisdiction under 28 U.S.C. § 1491(b) be exercised with "due regard to the ... need for expeditious resolution of the action," 28 U.S.C. § 1491(b)(3)—with support from longstanding substantive contract law and from regulations under a related statutory regime specific to bid protests. *See Blue & Gold*, 492 F.3d at 1313–14 (discussing "patent ambiguity" and "*contra proferentem*" doctrines and General Accountability Office regulations).

The dissent also suggests that we refrain from ruling on the *Blue & Gold* issue. But Inserso does not dispute that the issue was raised in the trial court, and it is an issue of law that we see no impediment to resolving ourselves.

***1350** C

[10] Those principles defeat Inserso's claims. Inserso should have challenged the solicitation before the competition concluded because it knew, or should have known, that DISA would disclose information to the bidders in the full-and-open competition at the time of, and shortly after, the notification of awards. Inserso knew that the Encore III solicitation process was divided into two competitions and that small businesses could compete for both suites, either individually or as part of a joint venture or partnership. J.A. 101907. It is undisputed that Inserso knew that the full-and-open competition had been completed in November 2017. *See* Appellee Br. 41; *see also* Encore III Full & Open, Sam.gov, https://beta.sam.gov/opp/96e2d2943ebc322905ebf27cf711e158/view#award (noting that contract award was originally published Nov. 7, 2017).

The FAR indicates that the winning total evaluated prices would have been provided to all unsuccessful offerors in the competitive range within three days of the award. 48 C.F.R. § 15.503(b)(1)(iv) ("Within 3 days after the date of contract award, the contracting officer *shall* provide written notification to each offeror whose proposal was in the competitive range but was not selected for award .... The notice *shall* include ... [t]he items, quantities, and any stated unit prices of each award. If the number of items or other factors makes listing any stated unit prices impracticable at that time, *only the total contract price need be furnished* in the notice.") (emphasis added). And DISA in fact included the awardees' total evaluated prices in its notifications to unsuccessful full-and-open offerors. *See*, *e.g.*, J.A. 186838–39.

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[11] Offerors in a government solicitation are "charged with knowledge of law and fact appropriate to the subject matter." *Per Aarsleff*, 829 F.3d at 1314 (citing *Turner Construction Co. v. United States*, 367 F.3d 1319, 1321 (Fed. Cir. 2004)). Here, that knowledge includes knowing that the total evaluated prices would be disclosed to bidders in the full-and-open competition at or shortly after the announcement of the awards in that competition. It also includes knowing that the express terms of the solicitation contemplated overlap of bidders in the two competitions (directly or through partnerships or joint ventures), so that Inserso, if it had taken reasonable care, would have known that recipients of the information at issue could include bidders in the small-business competition. The law and facts made patent that the solicitation allowed, and that there was likely to occur, the unequal disclosure regarding prices that Inserso now challenges.

We reach a similar conclusion about the information regarding DISA's evaluation methodology that Inserso alleges would have provided a competitive advantage to bidders in the small-business competition. Although the FAR does not require disclosing such information in the award notice, Inserso should have known that disclosure of this information was likely to be a part of the competitively valuable information required by the FAR to be included in the post-award debriefing. For example, post-award debriefings must include, at a minimum, "[t]he Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal", "[t]he overall evaluated cost or price ..., and technical rating, if applicable, of the successful offeror and the debriefed offeror," "[t]he overall ranking of all offerors," and "[a] summary of the rationale for award." 48 C.F.R. § 15.506(d). Although it may have been impossible to know the precise contents of the full-and-open competition's debriefings, Inserso should have known ***1351** that those debriefings were bound to contain information that would provide a competitive advantage in the small-business competition, including the "overall evaluated cost or price" of the successful offerors. *Id.*, § 15.506(d)(2).

In response to the government's forfeiture argument, Inserso argues that it could not have known that DISA would debrief the bidders in the full-and-open competition while the small-business offerors were still revising their proposals. Appellant's Reply Br. 29–30. Inserso points out that the regulations do not set a strict time limit on debriefing; rather, they require only that "[t]o the maximum extent practicable, the debriefing should occur within 5 days" after an offeror requests debriefing. 48 C.F.R. § 15.506(a)(2). Therefore, Inserso argues, DISA should not have conducted the debriefing for the full-and-open competition before the small-business competition closed.

[12] We do not think it reasonable for Inserso to have believed that DISA would delay—for three quarters of a year—the post-award debriefing of the bidders in the full-and-open competition. The debriefing process is an important part of the award process, and the expressly stated baseline rule of five days demonstrates the very short time scale understood to be important. The "practicable" qualifier gives some flexibility: one treatise notes that when there are many offerors, debriefing may not be completed for *weeks*. Government Contract Bid Protests: A Practical & Procedural Guide § 2:11. But no evidence or authority presented to us suggests that the "practicable" qualifier has been used, or could be reasonably counted on by Inserso to be used, to delay debriefing for many months. Nor could Inserso reasonably rely on DISA to decide to delay the debriefing based on a possibility of unequal advantage in the small-business competition where nobody had called the issue to its attention. The *Blue & Gold* forfeiture standard exists in recognition of the need for interested bidders to call the agency's attention to solicitation problems of which they reasonably should be aware.

Moreover, Inserso should have known that DISA had debriefed the bidders in the full-and-open competition once the GAO publicly dismissed a post-award protest of the awards in that competition. GAO's regulations specify that for "a procurement conducted on the basis of competitive proposals under which a debriefing is requested ..., the initial protest *shall not be filed before the debriefing date offered to the protestor*, but shall be filed not later than 10 days after the date on which the debriefing was held." 4 C.F.R. § 21.2(a)(2) (emphasis added). On February 21, 2018, GAO dismissed a post-award bid protest challenging DISA's awards in the full-and-open competition. *Planned Systems Int'l, Inc.* B-413028.5, 2018 WL 1898124 (Comp. Gen. Feb. 21, 2018). Inserso should have known, from the existence of a relevant protest at GAO, that the bidders in the full-and-open competition had been debriefed. Indeed, the GAO decision states as much. *Id.* at *3. The decision is not subject to a protective order, and there is no indication that it would not have been publicly available on the day it issued. Therefore, Inserso is properly charged with knowing, on or shortly after February 21, 2018, that the bidders in the full-and-open competition had been debriefed. [2]

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2 The dissent cites a solicitation provision that states: "The estimated labor hours used for evaluation purposes will not be provided to the offerors until after award." J.A. 101918. That provision does not generally negate the expected normal operation of the debriefing process in the full-and-open competition. It applies only to estimated labor hours—thereby highlighting the obviousness of the defect by omitting mention of any other competitively advantageous information.

***1352** Because a bidder in the small-business competition exercising reasonable and customary care would have been on notice of the now-alleged defect in the solicitation long before the awards were made, Inserso forfeited its right to raise its challenge by waiting until awards were made. Whether starting from the November 2017 award in the full-and-open competition or from the February 2018 GAO denial of a protest in that competition, Inserso had months to notify DISA of this defect before it submitted its final revised proposals. J.A. 178905. It had an additional two months before DISA selected the small-business awardees. J.A. 179528. Our previous cases establish that this amount of time is more than sufficient. *See COMINT*, 700 F.3d at 1383 ("Here, Comint had two and a half months between the issuance of Amendment 5 and the award of the contract in which to file its protest. That was more than an adequate opportunity to object.").

D

[13] Enforcing our forfeiture rule implements Congress's directive that courts "shall give due regard to ... the need for expeditious resolution" of protest claims. 28 U.S.C. § 1491(b)(3). The rule serves the interest in "reducing the need for the inefficient and costly process of agency rebidding after offerors and the agency have expended considerable time and effort submitting or evaluating proposals in response to a defective solicitation." *Bannum, Inc. v. United States*, 779 F.3d 1376, 1381 (Fed. Cir. 2015) (quoting *Blue & Gold*, 492 F.3d at 1314) (quotation marks and brackets omitted); *see also Per Aarsleff*, 829 F.3d at 1317 (Reyna, J. concurring).

The policy behind the forfeiture rule is served in this case. In its suit in the Court of Federal Claims, Inserso asked the court to provide all bidders in the small-business competition access to the unequally disclosed information and to reopen the competition to accept revised proposals. Had Inserso objected to the solicitation before the submission of final proposals, raising its concern that some bidders might have received information by participating in the full-and-open competition, DISA could have confirmed that an unequal disclosure occurred and provided the non-proprietary debriefing information to all bidders in the small-business competition. *Cf.* 48 C.F.R. § 15.507. Inserso is now seeking the relief it could have gotten from DISA earlier, before DISA had already expended considerable time and effort evaluating the bidders' proposals. Inserso has forfeited its right to this relief.

III

The Court of Federal Claims entered judgment on the administrative record "pursuant to the court's Opinion and Order, filed April 1, 2019." J.A. 6. Because the cited Opinion and Order relied on the determination that Inserso was not prejudiced by DISA's disclosure—an issue we do not reach—we think it appropriate to vacate the judgment and remand for entry of judgment on the ground of waiver, consistent with this opinion.

The parties shall bear their own costs.

VACATED AND REMANDED

Reyna, Circuit Judge, dissenting.

The majority decides that appellant's claims are barred under the *Blue & Gold* "waiver rule." This decision rests on shaky, legal ground and cannot stand. First, the ***1353** validity of the *Blue & Gold* "waiver rule" is undermined by the reasoning in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, —— U.S. ——, 137 S. Ct. 954, 197 L.Ed.2d 292 (2017). Second, the undermined *Blue & Gold* "waiver rule" does not apply to appellant's claims, which arise from latent errors not apparent from the solicitation. Third, the majority decides to bar appellant's claims under the *Blue & Gold* "waiver rule" in the first instance. We should not engage in such overreach given that the parties did not brief, and the Claims Court did not discuss, the interplay between *Blue & Gold* and *SCA Hygiene*. I respectfully dissent.

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I

First, the majority's opinion turns on the so-called *Blue & Gold "*waiver rule," a hard-and-fast rule that this court created. This rule runs afoul of the separation of powers principle articulated in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, —— U.S. ——, 137 S. Ct. 954, 197 L.Ed.2d 292, and for this and other reasons should not be the deciding factor in this case.

In *Blue & Gold*, we created a "waiver rule" for claims filed at the United States Court of Federal Claims ("Claims Court") challenging a patent error in a solicitation for a government contract. *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1315 (Fed. Cir. 2007). Although we called it a "waiver rule," this is a misnomer. Waiver is an equitable defense, the application of which is left to the trial court's discretion. *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1019 (Fed. Cir. 2008). To prove waiver, the defendant must show that the plaintiff *intentionally* relinquished its right. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Given the draconian effect of waiver, "[t]he determination of whether there has been an intelligent waiver of right ... must depend, in each case, upon the particular facts and circumstances surrounding that case." *Id.* The *Blue & Gold* waiver rule does not fit this definition. A court applying this rule gives no regard to the protestor's intent and is afforded no discretion in its application. These are not the marks of true waiver.

Rather, the *Blue & Gold* "waiver rule," in theory and in practice, is a judicially-created time bar. *See Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1316–17 (Fed. Cir. 2016) (Reyna J., concurring) (noting that under the *Blue & Gold* "timeliness bar" "[d]ismissal is mandatory, not discretionary" (internal citations omitted)); *see also Bannum, Inc. v. United States*, 779 F.3d 1376, 1381 (Fed. Cir. 2015); *Contract Servs., Inc. v. United States*, 104 Fed. Cl. 261, 273 (2012); *Unisys Corp. v. United States*, 89 Fed. Cl. 126, 137 (2009). The bar is triggered solely by the timing of a protestor's challenge. Specifically, if a protestor files a claim challenging a patent error in a solicitation *prior to the close* of the bidding process, the protestor's claim is deemed timely. *Blue & Gold*, 492 F.3d at 1313. If, however, the protestor files such a claim *after the close of bidding*, without having previously objected to such an error, the protestor's claim is untimely and will be dismissed. *Id.* at 1315; *Bannum*, 779 F.3d at 1380; *see* Maj. Op. at 1348–49. There are no exceptions to this rule; its application is hard and fast. *See Per Aarsleff*, 829 F.3d at 1316. [1] The *Blue & Gold* ***1354** "waiver rule" therefore poses as a rule of equitable waiver but is in fact a timeliness rule.

1 In creating the "waiver rule," this court relied on various analogous timeliness doctrines. First, we noted that our rule virtually tracks the "timeliness regulation" for bid protests filed before the Government Accountability Office ("GAO"), a federal agency which adjudicates bid protests. *Blue & Gold*, 492 F.3d at 1314. The GAO's timeliness rule is a self-imposed filing deadline for bid protests, functioning much like a statute of limitations. *See* 4 C.F.R. § 21.2(a).
We also found support in *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020 (Fed. Cir. 1992), a patent case where we relied on the equitable doctrines of laches and estoppel to bar relief, and in a long line of Claims Court cases applying the defense of laches. *Blue & Gold*, 492 F.3d at 1314–15. Notably, *SCA Hygiene* abrogated *Aukerman*. *See SCA Hygiene*, 137 S. Ct. at 967. Also, the Claims Court no longer applies laches to bar bid protests in light of *SCA Hygiene. See, e.g.*, *ATSC Aviation, LLC v. United States*, 141 Fed. Cl. 670, 696 (2019).

In *SCA Hygiene*, the Supreme Court clarified that: "[w]hen Congress enacts a statute of limitations, *it speaks directly to the issue of timeliness* and provides a rule for determining whether a claim is timely enough to permit relief." *SCA Hygiene*, 137 S. Ct. at 960 (emphasis added). Specifically, the Supreme Court "stressed" that "courts are not at liberty to jettison Congress' judgment on the *timeliness of suit*," even if the statute of limitations gives rise to "undesirable" "policy outcomes." *Id.* at 960, 961 n.4 (internal quotation marks omitted) (emphasis added). Relying on this principle, the Supreme Court held that a court cannot rely on the doctrine of laches, an equitable doctrine primarily focused on the timelines of a claim, to preclude a claim for damages incurred within the Patent Act's statute of limitations. *Id.* at 967; *see also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 685, 134 S.Ct. 1962, 188 L.Ed.2d 979 (2014) ("For laches, timeliness is the essential element."). Yet this is precisely what we are doing in this case.

The Supreme Court rejected the same concern we articulated as the driving force in *Blue & Gold*—that a plaintiff could sit

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on its rights to the detriment of the defendant—as justification for a timeliness rule distinct and separate from a statute of limitations. In *SCA Hygiene*, the dissent argued that laches filled a "gap" in the statute of limitations which allowed patentees to "wait until an infringing product has become successful before suing for infringement." *SCA Hygiene*, 137 S. Ct. at 961 n.4. The Supreme Court explained that such argument "implies that, insofar as the lack of a laches defense could produce policy outcomes judges deem undesirable, there is a 'gap' for laches to fill, notwithstanding the presence of a statute of limitations." *Id.* The Supreme Court explained such gap-filling is "precisely the kind of legislation-overriding judicial role" a court cannot take on. *Id.* (internal quotation marks omitted). Yet, in the face of this admonition, this court once again assumes such a legislative role.

Key here, and not discussed in *Blue & Gold*, is that Congress has spoken to the timeliness of challenges to patent errors in the solicitation. Congress provided that "***[e]very claim*** of which the United States Court of Federal Claims has jurisdiction," which includes challenges to patent errors in the solicitation, "shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (emphasis added); *see also* 28 U.S.C. § 1491(b)(1); *L-3 Commc'ns Integrated Sys., L.P. v. United States*, 79 Fed. Cl. 453, 460–61 (2007) (applying the six-year statute of limitations to bid protest claims). Congress also provided that the Claims Court has jurisdiction over solicitation challenges "*without regard to whether suit is instituted before or after the contract is awarded*." 28 U.S.C. § 1491(b)(1) (emphasis added). Given this clear congressional directive, we cannot curtail the six-year limitations period for challenges to patently defective solicitations. *See* ***1355** *SCA Hygiene*, 137 S. Ct. at 967. Thus, the *Blue & Gold* time bar directly conflicts with the reasoning in *SCA Hygiene*.

Additionally, our interest in reducing costly after-the-fact litigation and procurement delays does not save the *Blue & Gold* time bar from *SCA Hygiene*'s reach. We cannot override the Claims Court's six-year statute of limitations based on our own policy concerns. *Id.* ("[W]e cannot overrule Congress's judgment based on our own policy views."). To do so is to challenge policy judgments made by Congress in enacting the six-year statute of limitations. *Petrella*, 572 U.S. at 686, 134 S.Ct. 1962 (noting that it is "not within the Judiciary's ken to debate the wisdom" of the applicable statute of limitations).

Instead, we consider the prejudicial effects of delay at the remedy phase. *Id.* at 685, 687, 134 S.Ct. 1962 (noting that in "extraordinary circumstances, ... the consequences of a delay in commencing suit may be sufficient to warrant ... curtailment of the relief equitably awarded"). Here, the Claims Court has the discretion to "award *any relief* that the court considers proper," including declaratory relief, injunctive relief, and monetary relief limited to bid and proposal costs. 28 U.S.C. § 1491(b)(2) (emphasis added). Additionally, the Claims Court "shall give due regard to ... the need for expeditious resolution of the action." *Id.*, § 1491(b)(3). Thus, the Claims Court is empowered to consider a protestor's prejudicial delay when fashioning relief. Additionally, it is in the public interest that government-made errors in a solicitation do not go unreviewed, even if the only feasible remedy given a protestor's delay is a declaratory judgment that the government erred. *See Ian, Evan & Alexander Corp. v. United States*, 136 Fed. Cl. 390, 429 (2018) (noting that an "important public interest" is served through "honest, open, and fair competition" because such competition "improves the overall value delivered to the government in the long term" (internal quotation marks omitted)).

The majority recognizes that Congress imposed a six-year statute of limitations on bid protests before the Claims Court. The majority contends, however, that the *Blue & Gold* time bar is statutorily authorized because Congress instructed the Claims Court to give "due regard to the ... need for expeditious resolution of the action." Maj. Op. at 1349 (quoting 28 U.S.C. § 1491(b)(3)). The majority misreads Section 1491(b)(3).

First, a general and broad "need for expeditious resolution" of all bid protest claims does not translate into a discrete statute of limitations for a subset of bid protest claims, namely solicitation challenges. *See Blue & Gold,* 492 F.3d at 1315 (noting that "it is true that the jurisdictional grant of 28 U.S.C. § 1491(b) contains no time limit requiring a solicitation to be challenged before the close of bidding"). Specifically, per its plain language, Section 1491(b)(3) requires the Claims Court to give "due regard" to expeditious resolution of an action, not license to override the Claims Court's six-year statute of limitations.

Additionally, Section 1491(b)(3) must be read in context with the preceding provision, Section 1491(b)(2), which gives the Claims Court discretion in affording "any relief that the court considers proper." 28 U.S.C. § 1491(b)(2); *see, e.g.*, *McCarthy v. Bronson*, 500 U.S. 136, 139, 111

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S.Ct. 1737, 114 L.Ed.2d 194 (1991) (noting that "statutory language *must always* be read in its proper context" and not in isolation (emphasis added)). When both provisions are read in harmony, the "due regard" provision refers to the Claims Court's need to consider expeditious resolution of bid protests when deciding the proper relief. Specifically, ***1356** the Claims Court should consider whether to order the government to restart the procurement process underlying the bid protest or to award relief which would not extend the procurement process, such as bid and proposal costs or declaratory relief.

Lastly, the majority's reading of Section 1491(b)(3) runs afoul of the Supreme Court's reasoning in *SCA Hygiene.* As the Supreme Court explained, once Congress enacts a statute of limitations, the statute governs the timeliness of claims even in the face of other statutory provisions. *SCA Hygiene*, 137 S. Ct. at 963. In *SCA Hygiene*, the respondent argued that the Patent Act codified a laches defense, and, thus, laches could apply even in the face of a statute of limitations. *Id.* The Supreme Court explained that even assuming that the statute provided for laches "of some dimension," it did not follow that such a statutory defense could be invoked to bar a claim filed within the statute of limitations. *Id.* The Supreme Court explained that "it would be exceedingly unusual, if not unprecedented," for Congress to include both a statute of limitations and a laches provision. *Id.* The Supreme Court further explained that it was not aware of "a single federal statute that provides such dual protection against untimely claims." *Id.* As in *SCA Hygiene*, it would be unusual for Congress to provide dual protection against untimely solicitation-related claims via the broad discretionary language in Section 1491(b)(3) and the Claims Court's clear six-year statute of limitations. If no federal statute provides such dual protection, it would be unreasonable to impose a court-made timeliness bar to overcome a statute of limitations imposed by Congress.

For the above reasons, *Blue & Gold* conflicts with the reasoning in *SCA Hygiene*, and, thus, should not decide the outcome of this case.

II

Second, the majority improperly shoehorns Inserso's claims into the narrow and now undermined *Blue & Gold* domain. The *Blue & Gold* time bar applies only to challenges of *patent errors* in a solicitation. Inserso's claims, which do not challenge any patent errors in the solicitation, are not subject to this rule.

The *Blue & Gold* time bar applies only to challenges against *patent errors* in the solicitation. *Blue & Gold*, 492 F.3d at 1313. "Latent errors or ambiguities are not, of course, subject" to the *Blue & Gold* time bar. *COMINT Sys. Corp. v. United States*, 700 F.3d 1377, 1382 n.5 (Fed. Cir. 2012). An error is "patent" if it is "an obvious omission, inconsistency or discrepancy of significance." *Per Aarsleff*, 829 F.3d at 1312 (internal quotation marks omitted). By contrast, "[a] latent ambiguity is a hidden or concealed defect which is not apparent on the face of the document, could not be discovered by reasonable and customary care, and is not so patent and glaring as to impose an affirmative duty on plaintiff to seek clarification." *Id.*

Here, Inserso brought two claims before the Claims Court: an organizational conflict of interest ("OCI") claim and, in the alternative, a claim alleging that the government unequally treated offerors. Both of these claims arise from the government's disclosure of allegedly competitive pricing information to only the bidders in the Full & Open suite—one of two suites at issue. [2] This unequal disclosure occurred ***1357** only as a result of a divergence in the timing of the competitions of both suites. This timing discrepancy between the two suite competitions developed well after the release of the solicitations.

2 The competition at issue was divided into two "suites": one in which businesses of any size could compete (the "Full & Open" suite), and one in which businesses which qualify as "small business concerns" could compete (the "Small Business" suite). J.A. 101891. Large businesses could compete in the Small Business suite as part of a joint venture with a small business. The solicitation also noted that Full & Open and Small Business suite competitions would begin simultaneously. As it played out, the agency completed the Full & Open suite competition months before the Small Business suite competition. Inserso competed in the Small Business suite competition.

There is no obvious error, inconsistency, or discrepancy from the face of the solicitation indicating that the government would unequally disclose competitive pricing information. To the contrary, the solicitation informed bidders that the government (a) recognized that pricing information from

one suite could be competitively valuable in the other suite, and (b) would take necessary measures to prevent unequal disclosure of such information. For example, the solicitation provided that the government would not release its estimated labor hours, a key pricing data point, until the competition for both suite competitions concluded. J.A. 101918. The solicitation also provided that the government would identify any potential OCIs. J.A. 101815 ("If any [conflicts of interests] become known to the Government, as defined by FAR Part 9.5, *they will be identified.*" (emphasis added)).

To hold otherwise places an undue and unjustified burden on contractors to actively investigate, anticipate, and preemptively challenge all conflicts of interest that could potentially arise under a solicitation. Inserso is not the government's keeper. *See NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 523 n.17 (2011) ("No doctrine or case requires a potential protestor to be clairvoyant or to police an agency's general noncompliance with the FAR on the possibility that such misfeasance might become relevant in a protest."). Additionally, for small business contractors, like Inserso, such a burden could disincentivize entry to the federal procurement market. Rather, it is the government's burden to thoroughly investigate OCIs. For all federal government procurements, "contracting officers shall analyze planned acquisitions in order to ... [i]dentify and evaluate potential organizational conflicts of interests as early in the acquisition process as possible; and ... [a]void, neutralize, or mitigate significant potential conflicts before contract award." 48 C.F.R. § 9.504(a); *id.*, § 9.504(e). [3]

[3] Courts should exercise caution in applying the *Blue & Gold* time bar to OCI claims, if at all. An OCI is a significant error that undermines the integrity of the procurement process. *See NKF Eng'g, Inc. v. United States*, 805 F.2d 372, 380 (Fed. Cir. 1986) (explaining that an "unfair competitive advantage ... damages the integrity of the proposal system"). Given this gravity, and in light of *SCA Hygiene*, a court should review the merits of an OCI claim rather than bar such claim due to timeliness concerns.

The majority argues that Inserso should have known that the government would disclose competitive pricing information, specifically, details regarding its price evaluation methodology, to Full & Open competitors during the debriefing process. [4] ***1358** Maj. Op. at 1350–51. Thus, the majority reasons, Inserso should have challenged such disclosure from the outset of the competition. *See id.* The majority misunderstands the nature of agency debriefings. Apart from certain baseline required disclosures not at issue here, a government agency has discretion as to what it will disclose in a debriefing. *See* 48 C.F.R. § 15.506(d). Agencies can fail to provide any meaningful information to bidders. *See* Anna Sturgis, *The Illusory Debriefing: A Need for Reform*, 38 Pub. Cont. L.J. 469, 470, 2009. Thus, Inserso could not have reasonably known that the government would release detailed price evaluation methodology information in the Full & Open suite debriefings. The majority reaches a contrary conclusion through the lens of 20/20 hindsight.

[4] Once a competition concludes, a bidder may request a debriefing. *See* 48 C.F.R. § 15.506(a)(1). A debriefing is an opportunity for the government to discuss certain aspects of the competition and its evaluation of the bidder's proposal. If requested, the government is required to debrief the bidder. *Id.* Generally, bidders request a debriefing as a matter of course. Here, the government completed the Full & Open suite competition before the Small Business suite competition. Thus, the government debriefed the Full & Open suite competitors before the Small Business suite competitors.

The majority also suggests, without any articulated principled rationale, that the *Blue & Gold* time bar can extend to non-solicitation challenges. The majority's sole support is a non-binding Claims Court case. *See* Maj. Op. at 1348–49 (citing *Ceres Envtl. Servs., Inc. v. United States*, 97 Fed. Cl. 277, 310 (2011)). We have never previously extended *Blue & Gold* beyond challenges to the solicitation. *See, e.g.*, *Bannum*, 779 F.3d at 1380; *Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1385 (Fed. Cir. 2012); *COMINT*, 700 F.3d at 1382; *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1363 (Fed. Cir. 2009). We should not do so today. Specifically, such an extension is contrary to the express reasoning in *Blue & Gold.* In *Blue & Gold*, we relied on a determination that the defect at issue pertained to the "decision during the solicitation, not evaluation, phase of the bidding process." 492 F.3d at 1313. We also noted that a time bar against post-award challenges stemmed from the Claims Court's jurisdiction to adjudicate claims "***objecting to a solicitation*** by a Federal agency." *Id.* (quoting 28 U.S.C. § 1491(b)(1)) (emphasis added). Therefore, *Blue & Gold* made clear that any bar applies strictly to solicitation challenges only.

III

Lastly, the majority acts with improper haste when it bars *in the first instance* Inserso's claims pursuant to the undermined *Blue & Gold* time bar. As a general matter, a federal appellate court "does not consider an issue not passed upon below." *TriMed, Inc. v. Stryker Corp.*, 608 F.3d 1333, 1339 (Fed. Cir. 2010). There are, however, "circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where injustice might otherwise result." *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (internal quotation marks and citations omitted). This is not such a case.

Here, the parties narrowly briefed the applicability of *Blue & Gold* below and on appeal. Specifically, neither party briefed *Blue & Gold* post-*SCA Hygiene* and instead primarily focused on the merits of Inserso's claims. Most notably, the Claims Court did not address whether Inserso's claims were time-barred under *Blue & Gold* but instead reached the merits of Inserso's claims. Thus, given this backdrop, we should not apply *Blue & Gold* in the first instance. *See Wood v. Milyard*, 566 U.S. 463, 473, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012) (noting that appellate "restraint is all the more appropriate when the appellate court itself spots an issue the parties did not air below, and therefore would not have anticipated in developing their arguments on appeal"). We should instead reach the merits of Inserso's claims.

I respectfully dissent.

All Citations

961 F.3d 1343

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155 Fed.Cl. 738
United States Court of Federal Claims.

VS2, LLC, Plaintiff,
v.
The UNITED STATES, Defendant,
and
Vectrus Mission Solutions Corporation, Defendant-Intervenor.

No. 21-1028C
|
(Filed Under Seal: September 1, 2021)
|
(Reissued: September 14, 2021) [1]

Synopsis

Background: Disappointed bidder filed post-award bid protest challenging Department of Army's decision to switch award of logistics support services contract from bidder to awardee as corrective action after awardee's successful administrative bid protest before Government Accountability Office (GAO). Parties cross-moved for judgment on administrative record.

Holdings: The Court of Federal Claims, Matthew H. Solomson, J., held that:

[1] bidder's claims challenging corrective action were not waived;

[2] Army unreasonably switched contract award;

[3] bidder waived challenge to awardee's labor category substitutions;

[4] Army reasonably evaluated awardee's past performance; and

[5] permanent injunction was warranted preventing award of current contract.

Plaintiff's motion granted.

Procedural Posture(s): Review of Administrative Decision; Motion for Judgment on Administrative Record; Motion for Permanent Injunction.

West Headnotes (66)

[1] **Public Contracts** Parties; standing
United States Parties; standing

An "interested party," within the meaning of the Tucker Act, has standing to pursue a bid protest as an actual or prospective bidder whose direct economic interest would be affected by the award of the federal contract. 28 U.S.C.A. § 1491(b)(1).

[2] **Public Contracts** Parties; standing
United States Parties; standing

To satisfy the direct economic interest requirement for standing to pursue a post-award bid protest, under the Tucker Act, a plaintiff must show that there was a substantial chance it would have received the contract award but for the alleged error in the federal procurement process. 28 U.S.C.A. § 1491(b)(1).

[3] **United States** Judgment on administrative record

Judgment on the administrative record is properly understood as intending to provide for expedited trial on the record. RCFC, Rule 52.1.

[4] **United States** Judgment on administrative record

The rule governing a motion for judgment on the administrative record requires the Court of Federal Claims to make factual findings from the record evidence as if it were conducting a trial on the record. RCFC, Rule 52.1.

[5] **United States** Judgment on administrative record

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On a motion for judgment on the administrative record, Court of Federal Claims asks whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the record evidence. RCFC, Rule 52.1.

[6] **Public Contracts** Scope of review
United States Scope of review

Generally, in a bid protest action brought pursuant to the Tucker Act, the Court of Federal Claims reviews the agency's actions according to the standards set forth in the Administrative Procedure Act (APA). 5 U.S.C.A. § 706; 28 U.S.C.A. § 1491(b)(1).

[7] **Public Contracts** Scope of review
United States Scope of review

Under the Administrative Procedure Act (APA), Court of Federal Claims must determine in a bid protest whether (1) the federal procurement official's decision lacked a rational basis, or (2) the procurement procedure involved a violation of regulation or procedure. 5 U.S.C.A. § 706(2).

[8] **Public Contracts** Scope of review
Public Contracts Evidence
United States Scope of review
United States Evidence

When a bid protest is brought on the ground that the federal procurement official's decision lacked a rational basis, the test is whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion, and the disappointed bidder bears a heavy burden of showing that the award decision had no rational basis.

[9] **Public Contracts** Scope of review
United States Scope of review

In a bid protest challenging a federal procurement, Court of Federal Claims must determine whether the agency entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

[10] **Public Contracts** Scope of review
United States Scope of review

An agency's procurement decision may be arbitrary and capricious, under the Administrative Procedure Act (APA), if the agency has relied on factors which Congress has not intended it to consider. 5 U.S.C.A. § 706(2).

[11] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests
United States Rights and Remedies of Disappointed Bidders; Bid Protests

When bid protest is brought on ground that the federal procurement procedure involved a violation of statutes or regulations, the disappointed bidder must show clear and prejudicial violation.

[12] **Public Contracts** Scope of review
United States Scope of review

When applying the arbitrary and capricious standard of review, under the Administrative Procedure Act (APA), in the context of reviewing an agency's decision to follow a recommendation of the Government Accountability Office (GAO), an agency's procurement decision lacks a rational basis if it implements a GAO recommendation that is itself irrational. 5 U.S.C.A. § 706(2).

[13] **Public Contracts** Scope of review

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United States Scope of review

When applying the arbitrary and capricious standard of review, under the Administrative Procedure Act (APA), in the context of reviewing an agency's decision to follow a recommendation of the Government Accountability Office (GAO), the controlling inquiry is whether the GAO's recommendation was itself rational. 5 U.S.C.A. § 706(2).

[14] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Unless the Supreme Court or an en banc decision of the Federal Circuit decides otherwise, binding precedent requires Court of Federal Claims to continue to apply the waiver rule in accordance with the broadly applicable logic that underlies the rule, requiring that a party object to patently erroneous solicitation terms during the bidding process.

[15] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Under the "waiver rule," a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.

[16] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

The waiver rule, which requires that a party object to patently erroneous terms of a federal solicitation during the bidding process, furthers the statutory mandate, under the Tucker Act, requiring that Court of Federal Claims shall give due regard to the need for expeditious resolution of the action. 28 U.S.C.A. § 1491(b)(3).

[17] **Public Contracts** Scope of review

United States Scope of review

While the Tucker Act commands that the Court of Federal Claims consider the need for expeditious resolution of the bid protest action, that does not, by its plain terms, dictate dismissal of an action, but rather limits the relief that can be granted. 28 U.S.C.A. § 1491(b)(3).

[18] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

A waiver rule prevents contractors from taking advantage of the government and other bidders, and avoids costly after-the-fact litigation.

[19] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

The waiver rule does not articulate a rigid deadline that inescapably applies whenever an offeror might possibly have lodged its bid protest before the federal contract award.

[20] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Disappointed bidder did not waive its post-award bid protest claims challenging Department of Army's corrective action in switching award of logistics support services contract from bidder to awardee after awardee's successful bid protest before Government Accountability Office (GAO), since bidder could not have immediately filed suit challenging GAO's decision and subsequent contract award before

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submission of final bids because GAO's recommendation of corrective action did not guarantee that Army would implement that action, and bidder did not sit on its rights, but rather, protested award at GAO within seven days and then filed suit within one week after GAO's decision. 28 U.S.C.A. § 1491(b).

[21] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Any waiver doctrine should be applied in narrowly defined circumstances, in particular, where a bid protestor can determine a precise filing deadline for its complaint; a totality of the circumstances test is not predictable or workable and, most importantly, not required.

[22] **Injunction** Award of contract; bids and bidders

The totality of the circumstances is appropriately considered in terms of the propriety of injunctive relief in any given bid protest case challenging a federal procurement. 28 U.S.C.A. § 1491(b)(3).

[23] **Public Contracts** Reconsideration

United States Reconsideration

Department of Army's decision to switch award of logistics support services contract from bidder to awardee, as corrective action after awardee's successful administrative bid protest before Government Accountability Office (GAO), was arbitrary and capricious; although GAO correctly recommended that Army remove its upward most probable cost (MPC) adjustment to awardee's bid due to its proposed internal absorption of labor costs, GAO's decision recommending that Army flip award was erroneous as matter of law in that GAO ignored procurement regulations, solicitation, and GAO's own precedent requiring cost realism analysis, as GAO essentially directed Army to ignore unrealistic costs and performance risk that Army already had assessed against awardee due to cost caps.

[24] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

The primary purpose of a cost realism analysis prior to awarding a federal contract is to prevent offerors from gaining an advantage over competitors by proposing an unrealistically low estimated cost.

[25] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

In evaluating bids for a federal contract, the concern of the cost realism analysis is that since the contractor will be reimbursed on the basis of costs incurred, the contractor will not suffer economic consequences by proposing an estimated cost lower than its expected cost of performance; thus, the proposal offering the lowest estimated cost may not necessarily be the proposal which will result in the lowest cost of performance.

[26] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

In evaluating bids for a federal contract, a cost realism analysis is used as a means of determining the probable cost of performance of the work proposed by offerors, and this probable cost is used as the evaluation factor in making the source selection decision.

[27] **Public Contracts** Determinative Factors in Making Award

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United States Determinative Factors in Making Award

In evaluating bids for a federal contract, cost realism is used to determine whether offerors understand the contract requirements, and a finding of lack of understanding leads to downgrading of the proposal.

[28] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

Where a federal procuring agency determines that an offeror's proposed or estimated cost is unrealistically low, the agency may not only make an upward most probable cost (MPC) adjustment, but also may determine that the offeror's proposal represents an unacceptable risk to performance.

[29] **Public Contracts** Scope of review

United States Scope of review

Interpretation of a bid solicitation is a question of law that is reviewed by the Court of Federal Claims de novo.

[30] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

While an offeror may propose contractually binding cost caps to avoid an upward most probable cost (MPC) adjustment, the offeror for a federal solicitation cannot rely upon such caps to escape the required risk assessment; that is because where an offeror proposes to cap its cost for one or more cost-reimbursement contract line items (CLINs), the offeror effectively converts them to firm-fixed price CLINs, that is, where the actual costs of expected performance are otherwise projected to exceed the cost cap.

[31] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

In a case in which a bidder for a federal contract relies on binding cost caps to escape a required risk assessment, the concern of the procurement regulations is that the selected bidder ultimately will attempt to achieve profitability via substandard performance; therefore, a cost realism analysis must assess that risk.

[32] **Public Contracts** Cost-plus contracts

United States Cost-plus contracts

Where a firm offers a cap or ceiling on a particular cost that limits the government's liability and shifts liability for the cost to the offeror for a federal contract, and no other issue calls into question the effectiveness of the cap, any upward adjustment to the capped cost is improper.

[33] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

The federal procurement regulations' required cost realism analysis involves the assessment of performance risk, particularly where an offeror proposes to cap its costs such that it risks incurring a significant loss.

[34] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

Where an agency determines that an offeror's proposed costs are unrealistically low for the contemplated performance of the federal contract, the agency must account for that assessment in at least two ways: the agency must consider whether to adjust the proposed costs upwards for evaluation purposes, and it

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must consider whether the proposed costs are indicative of performance risk.

[35] **Public Contracts** Cost-plus contracts

United States Cost-plus contracts

With respect to a most probable cost (MPC) adjustment to a bid for a federal contract, the agency cannot simply accept the offeror's proposed costs because, an offeror's proposed costs are not dispositive in a cost-reimbursement environment since, regardless of the costs proposed, the government generally will be liable to the contractor for all allowable and allocable costs incurred in connection with the performance of the contract.

[36] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

A federal procuring agency must assess not only whether a most probable cost (MPC) adjustment is necessary to cure unrealistically low proposed costs but also whether such unrealistically low costs reflect a deficiency in the offeror's understanding of the solicitation's requirements.

[37] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

Where an offeror for a federal contract agrees to cap costs during performance and suggests the possibility of having to absorb a significant loss, an agency cannot ignore potential performance risks; if anything, an agency's concerns should be exacerbated.

[38] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

Any question concerning a bidder's ability to perform the federal contract in light of a capped cost is not per se only a matter of the bidder's responsibility rather than a matter to be considered by the agency in its cost realism evaluation.

[39] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

Where the federal solicitation expressly instructs offerors not to submit unrealistically low costs or prices, the risk stemming from an offeror's decision to propose unrealistically low capped rates is a matter for the agency's consideration in the context of its evaluation of proposals and source selection decision process.

[40] **Public Contracts** Form and requisites; responsiveness

United States Form and requisites; responsiveness

Court of Federal Claims will not apply a different rule depending upon whether or not applicable language in a federal solicitation is written in a certain font or style.

[41] **United States** Evidence and Affidavits

A lawyer's statements may constitute a binding admission of a party before the Court of Federal Claims if the statements are deliberate, clear, and unambiguous.

[42] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

When an offeror proposes unrealistically low costs for a particular performance of a federal contract, the agency must consider whether it will actually obtain such low costs during performance or whether the offeror has proposed

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low costs because it does not in fact understand the work to be performed; the first question goes to cost risk, and the second to performance risk.

[43] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

When an offeror for a federal contract projects costs realistically, but then agrees to cap the costs actually billed to the government, the cost risk itself may go away, but the performance risk either remains or is even amplified.

[44] **Public Contracts** Scope of review

United States Scope of review

What is different in cases when a procuring agency follows a Governmental Accountability Office (GAO) recommendation is not that a decision is being reviewed for rationality, but whose decision matters in review by the Court of Federal Claims.

[45] **Public Contracts** Scope of review

United States Scope of review

When the relevant procurement official, usually the contracting officer, decides to adopt the views of the Government Accountability Office (GAO) after a protest has been heard by that body, this agency decision is not considered inherently unreasonable for departing from the agency's previous position nor invulnerable under the shield of GAO authority, but is instead measured by the rationality of the recommendation it follows.

[46] **Public Contracts** Scope of review

United States Scope of review

When the federal procurement official decides to adopt the views of the Government Accountability Office (GAO) after an administrative protest, instead of deferring to the initial agency decision, and re-reviewing the protest that was brought in the GAO by scrutinizing the rationality of the initial decision, Court of Federal Claims defers to the second agency decision, and scrutinizes the rationality of the GAO's resolution of the protest it heard; but the review standard does not change because of the GAO's involvement.

[47] **Public Contracts** Scope of review

United States Scope of review

Since the amount of deference given by the Court of Federal Claims to an agency's procurement decision under the arbitrary and capricious standard of review does not change when Government Accountability Office (GAO) denies a protest of the decision, or when GAO sustains a protest but its recommendation is not followed, this deference is not altered by an agency's decision to follow a GAO recommendation; thus, no special amount of deference, covering questions of law as well as the ultimate decision being reviewed, applies to review of such corrective actions.

[48] **Public Contracts** Scope of review

United States Scope of review

Court of Federal Claims is not required to defer to Government Accountability Office's (GAO) views on questions of law, such as the interpretation of a solicitation or provisions of the federal procurement regulations.

[49] **Public Contracts** Scope of review

United States Scope of review

Court of Federal Claims does not find the numerous references in opinions to the deference to be given Government Accountability Office (GAO) decisions in the procurement area as supporting ceding to the GAO the court's normal role in deciding questions of law.

[50] **Public Contracts** Scope of review

United States Scope of review

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Court of Federal Claims has the duty to determine independently any questions of law, such as the correct interpretation of a solicitation, that must be addressed in bid protests.

[51] **Public Contracts** Scope of review

United States Scope of review

Court of Federal Claims should not conduct its own determination of a bidder's financial responsibility, an exercise within the purview of the procuring agency, not the court.

[52] **Public Contracts** Reliability and responsibility of bidder

United States Reliability and responsibility of bidder

In a bid protest challenging a federal procurement, the lack of documentation in support of a bidder's responsibility determination ordinarily is not fatal to the bid.

[53] **Public Contracts** Scope of review

United States Scope of review

Notwithstanding the wide discretion afforded to a contracting officer's responsibility determination, pursuant to the Administrative Procedure Act (APA) standard of review, a contracting officer's decision must be rational; the choice is committed to discretion, not whim.

5 U.S.C.A. § 706(2).

[54] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Disappointed bidder for Army's award of logistics support services contract waived challenge to awardee's shifting of required labor categories specified in solicitation to lower-paying categories, since solicitation contained patent ambiguity regarding whether offerors were permitted to make labor category substitutions, but bidder had opportunity to object to that ambiguity in solicitation yet failed to do so prior to close of bidding process, and instead, bidder likewise also substituted certain labor categories for those specified in solicitation.

1 Cases that cite this headnote

[55] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

Any error in awardee of Army's logistics support services contract shifting labor categories specified in solicitation to lower-paying categories was not prejudicial to disappointed bidder, since there would not have been substantial chance of different outcome in cost ranking among bidders even absent such error.

[56] **Public Contracts** Scope of review

United States Scope of review

In the context of a bid protest challenging a federal procurement, the assignment of a past performance rating is reviewed only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merits of the offerors' past performance is primarily a matter within the contracting agency's discretion.

[57] **Public Contracts** Scope of review

United States Scope of review

Court of Federal Claims affords great deference to a federal procurement agency's evaluation of an offeror's past performance.

[58] **Public Contracts** Reliability and responsibility of bidder

United States Reliability and responsibility of bidder

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Army reasonably evaluated past performance of awardee of logistics support services contract in compliance with solicitation; awardee's bid identified prior task order for which it received Level III Corrective Action Reports (CARs), including information on areas of concern, mitigating actions, and current status/verification of effectiveness for resolving identified issues, as required by solicitation, Army also reasonably relied on three positive contractor performance assessment reports (CPARS) related to same task order, in which assessing official recommended awardee for similar requirements in future, and Army further explained that awardee had significant amount of recent and relevant experience successfully performing work comparable to logistics contract.

[59] **Public Contracts** Scope of review

United States Scope of review

In a bid protest challenging a federal procurement, Court of Federal Claims is not empowered to substitute its judgment for that of the agency, where the agency's conclusions find support in the record.

[60] **Injunction** Award of contract; bids and bidders

In evaluating whether permanent injunctive relief is warranted in a bid protest challenging a federal procurement, Court of Federal Claims must consider: (1) whether the plaintiff has succeeded on the merits, (2) whether the plaintiff has shown irreparable harm without the issuance of the injunction, (3) whether the balance of the harms favors the award of injunctive relief, and (4) whether the injunction serves the public interest.

[61] **Injunction** Award of contract; bids and bidders

The loss of potential profits from a government contract constitutes irreparable harm required for issuance of a permanent injunction in a bid protest challenging a federal procurement.

[62] **Injunction** Award of contract; bids and bidders

Bid protestor would suffer irreparable harm absent permanent injunction preventing award of current contract to provide logistics support services for Army; protestor would suffer more than simply economic harm from loss of contract, as protestor would have retained its original award, along with attendant benefits of experience and future past performance reference, but for Army's implementation of irrational recommendation by Government Accountability Office (GAO) to switch award of contract from protestor as corrective action after another bidder's successful administrative bid protest before GAO.

[63] **Injunction** Award of contract; bids and bidders

Economic harm, without more, does not rise to the level of irreparable injury required to grant permanent injunctive relief in a bid protest challenging a federal procurement.

[64] **Injunction** Award of contract; bids and bidders

Balance of hardships weighed in favor of granting permanent injunction preventing Army's award of current contract to provide logistics support services, after Army implemented irrational recommendation by Government Accountability Office (GAO) to switch award of contract from bid protestor as corrective action after another bidder's successful administrative bid protest before GAO, since Army intended to issue bridge contract, so Army would not have to halt or somehow unwind any current contract performance upon grant of injunction, and there was no evidence that Army would be harmed by reconsidering implications of risk assessment it had already performed.

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[65] **Injunction** Award of contract; bids and bidders

In analyzing a request for permanent injunctive relief in a bid protest challenging a federal procurement, there is an overriding public interest in preserving the integrity of the procurement process by requiring the government to follow its procurement regulations.

[66] **Injunction** Award of contract; bids and bidders

Public interest in preserving integrity of procurement process by requiring Army to follow procurement regulations would be served by granting permanent injunction preventing Army's award of current contract to provide logistics support services, after Army implemented irrational recommendation by Government Accountability Office (GAO) to switch award of contract from bid protestor as corrective action following another bidder's successful administrative bid protest before GAO, since irrational corrective action tainted procurement process.

Attorneys and Law Firms

***745** Paul F. Khoury, Wiley Rein LLP, Washington, D.C., for Plaintiff. With him on the briefs were Craig Smith, Cara L. Lasley and Nicholas L. Perry. Also on the briefs were Cameron S. Hamrick, C. Peter Dungan, and Roger V. Abbott, Miles & Stockbridge P.C., Washington, D.C.

Sosun Bae, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for Defendant. With her on the briefs were Brian M. Boynton, Acting Assistant Attorney General, Civil Division, Martin F. Hockey, Jr., Acting Director, and Douglas K. Mickle, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C. Also on the briefs were Dana J. Chase and Captain Ethan S. Chae, United States Army Legal Services Agency, Contract Litigation & Intellectual Property Division, Fort Belvoir, VA.

Kevin P. Mullen, Morrison & Foerster LLP, Washington, D.C., for Defendant-Intervenor. With him on the briefs were James A. Tucker, Alissandra D. Young, and Victoria D. Angle.

OPINION AND ORDER

SOLOMSON, Judge.

Plaintiff, VS2, LLC ("VS2") challenges the decision of Defendant, the United States, acting by and through the Department of the Army ("Army" or the "Agency"), to switch the award of the Fort Benning Logistics Support Services contract from VS2 to Defendant-Intervenor, Vectrus Mission Solutions Corporation ("Vectrus"), following Vectrus's successful bid protest before GAO. VS2 contends not only that GAO's recommendation was flawed – and, thus, that the Agency should not have followed it – but also that Vectrus's proposal failed to comply with material terms of the solicitation and otherwise was not awardable.

In response, the government and Vectrus attempt to land a massive knock-out punch, in the form of a novel *Blue & Gold* waiver argument, that would have the effect of rendering VS2's entire protest untimely. That argument, however, threatens to reforge *Blue & Gold* from a sensible shield against gamesmanship and unjustifiable delay into a broadsword capable of cutting down even meritorious arguments in a manner our appellate court, the United States Court of Appeals for the Federal Circuit, has never ***746** sanctioned. This Court declines to engage in such creative metallurgy. Unless and until the Federal Circuit compels us to do so, *Blue & Gold* cannot be expanded past the factual and procedural circumstances in which the Federal Circuit has applied it.

On the merits, the Court rejects most of VS2's arguments as unsupported, but nevertheless concludes that GAO's decision in this case, recommending award to Vectrus, is clearly erroneous as a matter of law. The result is that, at least on this record, the Agency has failed to support its decision to switch the contract award from VS2 to Vectrus. Accordingly, and for the reasons explained below, the Court **GRANTS** VS2's motion for judgment on the administrative record and **DENIES** the government's and Defendant-Intervenor's

respective cross-motions for judgment on the administrative record.

I. FACTUAL BACKGROUND [2]

A. The Solicitation

On September 18, 2019, the Army issued Solicitation W52P1J-19-R-0070 ("the Solicitation" or "RFP") for logistics support services at Fort Benning, Georgia to holders of the Army's Enhanced Army Global Logistics Enterprise ("EAGLE") basic ordering agreement. AR 67. The anticipated contract covered maintenance, supply, and transportation support services. *Id.* The Solicitation informed potential offerors that the Army intended to award a single, cost plus fixed fee task order, with certain firm fixed priced contract line items ("CLINs"), with a period of performance of one base year and four option years. AR 67.

The Solicitation established four evaluation criteria: (1) technical; (2) past performance; (3) cost/price; and (4) small business participation. AR 144 (RFP § M.4.1). The technical and small business participation factors were rated for acceptability only, while the past performance factor had a range of qualitative confidence ratings. *Id.* The Solicitation required the Army to award a contract to the offeror with the lowest total evaluated price that also was determined to be technically acceptable, with substantial confidence in past performance and an acceptable rating in small business participation. AR 67, 143 (RFP § M.1.1).

The Solicitation's instructions clarified that, in order to submit a compliant proposal, "[i]t is the offeror's obligation to submit an unambiguous proposal that clearly reflects the offeror's intended technical approach and establishes cost credibility. Any inconsistency, whether real or apparent, between promised performance and proposed cost must be adequately explained in the proposal." AR 125 (RFP § L.4.1.3). In evaluating the cost/price factor, the Solicitation required the Army to conduct a cost realism analysis, as well as evaluate price reasonableness. AR 149 (RFP § M.5.3.2). The Solicitation expressly warned offerors to avoid proposing unrealistically low costs:

> Offerors are cautioned that the Government has concerns with the potential for post-award performance problems if Offerors propose unrealistically low costs. Therefore, the Government reserves the option of rejecting a proposal if, in the exercise of its judgment, it determines that an Offeror's cost proposal is unrealistically low, regardless of technical merit and/or evaluated costs.

AR 149 (RFP § M.5.3.2.1). The Solicitation further provided that "failure of the Offeror to establish the credibility of its proposed costs may result in a MPC adjustment being made to the costs proposed, ***and/or the proposal being rejected as unrealistically low and not further considered for award***." *Id*. (emphasis added). In that regard, the Solicitation made clear that:

> [I]f a business policy decision to absorb a portion of the estimated cost was made, that approach must be stated within the proposal (including any associated calculations). Failure to adequately explain an inconsistency between promised performance and cost may result in a finding of Technical Unacceptability ***or*** a finding that ***747** a proposed cost is unrealistic for work to be performed.

AR 125 (RFP § L.4.1.3) (emphasis added).

With respect to the past performance factor, the Solicitation directed that the offeror should "identify all recent contracts where it ... experienced any performance problems that occurred within three years prior to the closing date of this RFP" and provide corrective action reports, cure notices, nonconformance reports, or show cause letters. AR 135 (RFP § L.5.3.5.1).

For the technical factor, the Solicitation required offerors to submit a "Staffing and Management Plan," to be evaluated by the Agency to determine if the plan "adequately details a realistic and feasible approach to delivering services required in the PWS." AR 146 (RFP § M.5.1.2). [3] Relatedly, offerors had to complete Solicitation Attachment 002 – Staffing/

Labor Mix, as part of "present[ing] a staffing approach which demonstrates a thorough understanding of the effort and provides the expected skill sets / skill level of each position, to include level of responsibility in order to successfully perform the specific workload requirements identified at Exhibit A TD-01 Workload and meet all the PWS requirements." AR 129 (RFP § L.5.2.1.1(c)).

The Army provided offerors with an opportunity to submit questions to the Agency to attempt to clarify any ambiguities in, or to raise other issues with, the Solicitation. AR 627-29. An offeror posed a question regarding the type of full-time equivalents ("FTEs") it was permitted to propose:

> The Government instructed industry that all minimum hours requirements within TD-01 must be met by utilizing CBA positions. We noted the following position was not included in the updated CBA-SCA Crosswalk issued with Amendment 1: (1) Truck Driver, Medium. Can the government update the CBA-SCA crosswalk to include the omitted position?

AR 627.[4] The government responded: "Not omitted. TD-01 accurately reflects the workload." *Id*.

B. Proposals, Evaluations, and Initial Award

In response to the Solicitation, several offerors, including VS2 and Vectrus, submitted timely proposals. *See generally* AR Tab 7, AR Tab 9. The Army reviewed and evaluated the proposals, established a competitive range, and opened discussions with the three offerors in that range: VS2, Vectrus, and Vanquish Worldwide, LLC ("Vanquish"). *See generally* AR Tabs 10-12. As part of these discussions, the Army issued evaluation notices ("ENs") to each of the offerors, requiring them to address particular proposal deficiencies the Agency identified. AR 2810-12, 2837-39, 2850-52. In one such notice to Vectrus, the Army identified an "inconsistency between the costs/prices proposed in the Cost/Price Volume and the promised performance in the Technical Volume." AR 2854. The Army explained:

> Based on review of [Vectrus's proposal] it appears Vectrus has reduced the labor rate for [* * *] FTE to $[* * *]. As required at RFP paragraph L.5.2.12(a)(2) Offerors are instructed that compliance with the SCA/CBA is required. Based on the narrative rationale and cost proposal it would appear the Offeror has discounted the CBA labor rates which is not in compliance with the RFP. It also appears that the Offeror has failed to explain how it intends to compensate the proposed FTE in accordance with the CBA and still perform the requirements at an acceptable level. Therefore, the Government has concerns with the potential for post-award performance problems as the proposed costs appear unrealistically low. The burden of persuasion as to the cost credibility rests with the Offeror.

AR 2857-58. The Army informed Vectrus that if it failed to explain or remedy the proposed labor rate discounts, "the Government intends to apply an upward Most Probable Cost (MPC) adjustment to ensure that all proposed labor rates comply with the SCA/CBA requirements and all hours proposed ***748** in the Technical Volume are priced in the Cost/Price Volume." AR 2858.

In response to the Army's notice, Vectrus submitted several questions, including the following inquiry:

> (b) ... [I]s it also an acceptable Business Policy Decision to propose to forgo hiring such deeply discounted FTEs, with the understanding that: (1) mission support would not be negatively impacted, (2) we are basing our Business Policy Decision on documented, historical experience providing equivalent support at Fort Bragg, and (3) should Vectrus at some

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> point need to hire any or all of these FTEs that Vectrus would bear the full cost of compensating such employees IAW the SCA or CBA?

AR 2886. The Army replied that Vectrus "has not established cost credibility and/or shown that the proposed costs are realistic for the promised performance," adding that "based on question (b) it appears there is an inconsistency between the promised performance in the technical volume and the costs proposed as the offeror refers to forgoing the hiring of these FTE." AR 2887. The Army also stated that "Offerors are required to meet the minimum requirements of the RFP. Additionally, question (b) refers to forgoing the hiring of the FTE in question, which is not reflected in the Offeror's Technical Volume." AR 2887.

Vectrus ultimately submitted a revised proposal in which Vectrus represented that it would absorb the labor costs of [* * *] FTEs. AR 4600. Vectrus described this decision as providing a "no-risk cost savings of $22,176,308" to the Army. *Id.* Vectrus explained its ability to absorb the costs, as follows:

> Vectrus is a financially sound and transparent publicly traded corporation with a strong cash position; as such, our company is fully capable of absorbing the cost of this Business Policy Decision. Vectrus formally acknowledges and accepts the risks and responsibilities associated with this decision. This decision will not impact our operational approach to managing and executing the Fort Benning Task Order (TO) PWS technical requirements and achieving the associated ... performance standards.

AR 4600.

After receiving revised proposals, the Army conducted a final evaluation. AR 5606-5611 (Final Evaluation Summary). The Army concluded that all three offerors were technically acceptable, and had submitted an acceptable small business participation plan. AR 5611. The Army also assigned both VS2 and Vectrus "substantial confidence" past performance ratings. AR 5611. When evaluating cost/price, however, the Army – based on concerns with Vectrus's revised Business Policy Decision – adjusted Vectrus's proposed price upwards by $19,719,898, for a total MPC of $270,551,185. AR 5540. The Army's cost-realism analysis determined that Vectrus's proposed business policy decision – promising a cost credit – was unrealistic because: (1) based on Vectrus's questions regarding the evaluation notice, Vectrus would likely forego the hiring of [* * *] FTEs, creating an inconsistency with the technical volume, as well as posing a risk to the government in the form of post-award performance problems; and (2) the proposed cost credit is higher than the proposed fee ($17,839,964 for the cost credit versus $[* * *] for the fee) and, therefore, the proposed credit is unrealistic because it would not be covered by the proposed fee if issues were to arise during performance of the contract. AR 5566. With this MPC adjustment, Vectrus's final proposed price of $270,551,185 was higher than VS2's proposed price of $257,097,548. AR 5467, AR 5540. The Army concluded that VS2 submitted the proposal with the lowest total evaluated price that was technically acceptable, with substantial confidence in past performance (and an acceptable small business participation plan); the Agency selected VS2 for the award. AR 5590-91.

Vectrus requested a post-award debriefing, which the Army provided. AR 5923-32. In response to Vectrus's questions, the Army reiterated that it viewed Vectrus's proposed cost absorption as unrealistic:

> The offeror lacked cost credibility IAW L.5.4.1.3 as the proposed cost credit well exceeded the amount of fixed-fee proposed. ***749** The offeror did not establish credibility with its final proposal revision with rationale explaining how the offeror would fund the delta in cost. The offeror simply states that corporate proceeds would be used to absorb the costs for the [* * *] FTE for which a credit is applied; however, did not explain why it feels this is a realistic approach *or how the offeror would still perform at an acceptable level*; therefore, the

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> proposed credit was determined to be unrealistic.

AR 5928 (emphasis added). The Army also explained that Vectrus's "proposed costs do not reflect the true cost or performance and in the face of competitive pressure [Vectrus] submitted an unrealistically low price in order to win the contract (buying in); with the expectation of recouping all or most of the costs related to cost overrun or on change orders." AR 5929.

C. Vectrus's GAO Protest

On July 9, 2020, Vectrus filed a protest with GAO, in which Vectrus alleged that the Army "unreasonably rejected one of Vectrus's compliant and legally binding business policy decisions" to absorb labor costs; in a nutshell, Vectrus challenged the Army's assessment of the MPC adjustment to Vectrus's proposed cost/price.[5] AR 5763, 5775. Vectrus contended that "[i]t was unreasonable and a violation of the terms of the Solicitation and the regulations governing cost-realism analysis for the Agency to apply an MPC adjustment." AR 5764.

On October 27, 2020, GAO sustained Vectrus's protest, concluding that the Army had improperly made an upward MPC adjustment to Vectrus's proposed cost. AR 6382-92. GAO concluded that the cost evaluator had made an "unwarranted assumption about Vectrus's potential behavior during contract performance" – *i.e.*, that Vectrus may forego hiring the [* * *] FTEs – based on an exchange with Vectrus during discussions. AR 6390. GAO also concluded that the Agency made the cost adjustment based on an "unsubstantiated belief about the fiscal wherewithal of Vectrus[,]" despite Vectrus's express assumption of legal liability for its cost reduction. AR 6390. GAO explained that:

> [W]here a firm offers a cap or ceiling on a particular cost that limits the government's liability and shifts liability for the cost to the offeror--and no other issue calls into question the effectiveness of the cap--any upward adjustment to the capped cost is improper. Any question concerning a firm's ability to perform the contract in light of a capped cost that is below the actual cost is a matter of the firm's responsibility rather than a matter to be considered by the agency in its cost realism evaluation.

AR 6386 (citing *Affordable Eng'g Servs., Inc.*, B-407180.4, 2015 CPD ¶ 334, 2015 WL 7450123, *5-*6 (Aug. 21, 2015)); *see also* AR 6391 (concluding that "where, as here, a firm offers a cap or ceiling on a particular cost that effectively limits the government's liability and shifts liability for the cost to the offeror ..., the only appropriate consideration for the agency is whether the offeror may be found responsible in light of the proposed assumption of liability"). GAO determined that without the improper cost adjustment, Vectrus's total evaluated cost/price would have been $250,831,287, which was lower than VS2's cost/price. AR 6391. As a result, GAO recommended that the Army terminate the task order issued to VS2 and issue the award, instead, to Vectrus, "if otherwise proper." AR 6392.

Following GAO's decision, the Agency considered its options[6] and, ultimately, elected to follow GAO's recommendation to award ***750** the task order to Vectrus. AR 6393, 6396-97. On November 10, 2020, the Army notified VS2 that its contract award would be terminated for convenience. AR 5675. On December 4, 2020, the Army officially awarded the contract to Vectrus. AR 5686.

On December 11, 2020, VS2 filed a protest at GAO challenging the Army's decision to award the contract to Vectrus. AR 6472. On February 25, 2021, GAO dismissed VS2's protest, holding that it was an untimely request for reconsideration of the *Vectrus* protest decision and that at least one argument, regarding past performance, should have been raised in that earlier GAO proceeding. AR 6765-72.

II. PROCEDURAL HISTORY

On March 4, 2021, VS2 filed its complaint in this Court. ECF No. 1. On April 15, 2021, VS2 filed a motion to amend its complaint, which this Court granted. ECF No. 26 ("Am. Compl."). VS2 asserts in its amended complaint that: (1) the Army implemented corrective action based on a GAO decision and recommendation that were irrational; (2) the Army irrationally failed to consider the performance risk resulting from Vectrus's proposal to absorb

a significant sum of the performance costs; (3) the Army never considered how the proposed cost absorption impacted Vectrus's responsibility; (4) Vectrus should not have received a past performance rating sufficient to have been considered for award in the first place because of poor performance on other Army contracts; and (5) Vectrus should not have been considered for award because its proposal deviated from the terms of the Solicitation by substituting lower-cost labor categories for those specified in the TD-01 Solicitation spreadsheet offerors were required to complete. Am. Compl. at 2-5. Vectrus filed an unopposed motion to intervene, which this Court granted. ECF No. 10, Minute Order (Mar. 5, 2021).

On March 25, 2021, the government filed the administrative record. ECF No. 24. On May 3, 2021, the parties filed their motions for judgment on the administrative record. ECF Nos. 29-2 ("Pl. MJAR"), 30 ("Intv. MJAR"), 31 ("Def. MJAR"). On June 14, 2021, the parties filed their responses. ECF Nos. 37 ("Pl. Resp."), 38 ("Def. Resp."), 39 ("Intv. Resp."). On July 13, 2021, the Court held oral argument on the parties' pending motions. ECF Nos. 40, 42 ("Oral Arg. Tr.").

III. JURISDICTION AND STANDING

[1] **[2]** The Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870, provides this Court with "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). "An interested party is an actual or prospective bidder whose direct economic interest would be affected by the award of the contract." *Digitalis Educ. Sols., Inc. v. United States*, 664 F.3d 1380, 1384 (Fed. Cir. 2012). To satisfy the "direct economic interest" requirement in a post-award bid protest, a plaintiff "must show that there was a 'substantial chance' it would have received the contract award but for the alleged error in the procurement process." *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003) (quoting *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999)).

Neither the government nor Vectrus contends that VS2 lacks standing to maintain its amended complaint.

IV. STANDARD OF REVIEW

[3] **[4]** **[5]** Judgment on the administrative record pursuant to RCFC 52.1 "is properly understood as intending to provide for an expedited trial on the record." *Bannum, Inc. v. United States*, 404 F.3d 1346, 1356 (Fed. Cir. 2005). The rule requires the Court "to make factual findings from the record evidence as if it were conducting a trial on the record." *Id.* at 1354. The Court asks whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the record evidence. *Id.* at 1356–57.

[6] **[7]** Generally, in an action brought pursuant to § 1491(b) of the Tucker Act, the Court reviews "the agency's actions according to the standards set forth in the Administrative Procedure Act, 5 U.S.C. § 706." ***751** *Nat'l Gov't Servs., Inc. v. United States*, 923 F.3d 977, 981 (Fed. Cir. 2019). Pursuant to the APA standard of review, the Court asks "whether the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* (quoting 5 U.S.C. § 706(2)). The Court must "determine whether '(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.' " *Id.* (quoting *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1358 (Fed. Cir. 2009)).

[8] **[9]** **[10]** **[11]** "When a challenge is brought on the first ground, the test is whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion, and the disappointed bidder bears a heavy burden of showing that the award decision had no rational basis." *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (internal citations omitted). The Court thus must determine whether "the agency entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Ala. Aircraft Indus., Inc.–Birmingham v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). An agency's decision also may be arbitrary and capricious "if the agency has relied on factors which Congress has not

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intended it to consider." *Technica LLC v. United States*, 142 Fed. Cl. 149, 154 (2019) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. 2856). "When a challenge is brought on the second ground, the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations." *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1333 (Fed. Cir. 2001) (citing *Kentron Hawaii, Ltd. v. Warner*, 480 F.2d 1166, 1169 (D.C. Cir. 1973)).

[12] **[13]** Further, "[w]hen applying [the arbitrary and capricious] standard of review in the context of reviewing an agency's decision to follow a GAO recommendation, [the Federal Circuit has] stated that an agency's decision lacks a rational basis if it implements a GAO recommendation that is itself irrational." *Turner Const. Co. v. United States*, 645 F.3d 1377, 1383 (Fed. Cir. 2011) (citing *Centech Grp. v. United States*, 554 F.3d 1029, 1039 (Fed. Cir. 2009), and *Honeywell, Inc. v. United States*, 870 F.2d 644, 648 (Fed. Cir. 1989)). The controlling inquiry is thus "whether the GAO's recommendation was itself rational." *Raytheon Co. v. United States*, 121 Fed. Cl. 135, 151, *aff'd*, 809 F.3d 590 (Fed. Cir. 2015).

V. THE *BLUE & GOLD* WAIVER RULE DOES NOT GENERALLY PRECLUDE VS2's PROTEST

[14] Vectrus argues at length that the Federal Circuit's decision in *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007), "binds the Court of Federal Claims" and "applies equally to solicitation defects and conflicts of interest as [well as] to corrective action challenges." Intv. MJAR at 16. Vectrus thus maintains that *Blue & Gold* requires the dismissal of all of VS2's claims in this case because VS2 "objected" to the Agency's actions at issue "only after the Agency completed its corrective action ...." *Id.* at 19-20. This Court is in complete agreement with Vectrus that "[u]nless the Supreme Court or an *en banc* decision of the Federal Circuit" decides otherwise, "binding precedent requires this Court to continue to apply the *Blue & Gold* waiver rule in accordance with the broadly applicable logic that underlies it." *Id.* at 17. In that regard, there is no question that the Federal Circuit repeatedly has applied and affirmed the vitality of the *Blue & Gold* waiver rule.[7] ***752** While this Court ultimately disagrees with the government and Vectrus regarding just how "broadly applicable" the *Blue and Gold* waiver rule is, Intv. MJAR at 17, the parties' *Blue & Gold* argument deserves a more detailed analysis here.

[15] **[16]** In *Blue & Gold*, the Federal Circuit held, for the first time, "that a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims." 492 F.3d at 1313. Although this "waiver rule" has been criticized as "a judicially-created time bar[,]" *see Inserso Corp. v. United States*, 961 F.3d 1343, 1353 (Fed. Cir. 2020) (Reyna, J., dissenting),[8] the Federal Circuit's holding in *Blue & Gold* is rooted (albeit somewhat loosely) in the statutory text providing this Court with jurisdiction to decide procurement-related actions:

> Section 1491(b) of title 28 U.S. Code provides the Court of Federal Claims with "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency." 28 U.S.C. § 1491(b)(1). In doing so, the statute mandates that "the courts shall give due regard to the interests of national defense and national security and *the need for expeditious resolution of the action*." *Id.* § 1491(b)(3) (emphasis added). Recognition of a waiver rule, which requires that a party object to solicitation terms during the bidding process, furthers this statutory mandate.

Blue & Gold, 492 F.3d at 1313 (emphasis in original).[9] In essence, then, the Federal Circuit in *Blue & Gold* did nothing more than operationally-define the nebulous statutory command in § 1491(b)(3) as imposing a *per se* deadline for challenges to the terms of a solicitation. *Id.* at 1315 (explaining that "while it is true that the jurisdictional grant of 28 U.S.C. § 1491(b) contains no time limit requiring a solicitation to be challenged before the close of bidding, the statutory mandate of § 1491(b)(3) for courts to 'give due regard to ... the need for expeditious resolution of the action'

and the rationale underlying the patent ambiguity doctrine favor recognition of a waiver rule").

The government and Vectrus contend that *Blue & Gold* should apply "to corrective action challenges" and, more broadly, to any "alleged problem in the procurement process." Intv. MJAR at 14-15 (Vectrus arguing that "[i]f an offeror identifies an alleged problem in the procurement process, it is not permitted to wait for the Government and other parties to incur time and effort to undertake that allegedly flawed process, to wait and see who wins the contract"); *see also* Def. MJAR at 11 (government arguing that "both the Court of Appeals for the Federal Circuit and this Court have expanded the reasoning of *Blue & Gold* beyond its original scope" and that "this Court has frequently ***753** held that waiver pursuant to *Blue & Gold* applies to a protestor who waits to contest a corrective action until after the agency has issued a new award"). VS2 counters that "[t]he Federal Circuit's expansions of *Blue & Gold* have been incremental, addressing solicitation defects and anchored in considerations of efficiency and fairness." Pl. Resp. at 5.

[17] In resolving the parties' disagreement regarding whether VS2's action is timely, the Court begins with the plain language of our jurisdictional statute – the Tucker Act, as amended, *see* 28 U.S.C. § 1491 – and its related statute of limitations, *see* 28 U.S.C § 2501. If this Court were writing on a *tabula rasa*, the issue presented would be an easy call, as there is simply no language in either statute that makes VS2's action here untimely; even according to the government and Vectrus, VS2 is nowhere near the six-year statute of limitations. 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."). While 28 U.S.C. § 1491(b)(3) commands that the Court consider "the need for expeditious resolution of the action[,]" that does not, by its plain terms, dictate dismissal of an action, but rather "limits the relief that can be granted." *SEKRI*, 152 Fed. Cl. at 753 ("The court, for example, cannot grant relief to a protestor who challenges the terms of a solicitation years after the proposal deadline, even if the protestor's complaint is filed before the statute of limitations.").

[18] Notwithstanding the absence of plain statutory language precluding VS2's claims here as untimely, this Court is, of course, bound to follow the Federal Circuit's decisions, including its *Blue & Gold* waiver rule and its later applications of that rule. The rationale for the *Blue & Gold* waiver rule – albeit based upon the statutory command in 28 U.S.C. § 1491(b)(3) – is narrow:

> In the absence of a waiver rule, a contractor with knowledge of a solicitation defect could choose to stay silent when submitting its first proposal. If its first proposal loses to another bidder, the contractor could then come forward with the defect to restart the bidding process, perhaps with increased knowledge of its competitors. A waiver rule thus prevents contractors from taking advantage of the government and other bidders, and avoids costly after-thefact litigation. Accordingly, the same reasons underlying application of the patent ambiguity doctrine against parties to a government contract speak to recognizing a waiver rule against parties challenging the terms of a government solicitation.

Blue & Gold, 492 F.3d at 1314.

[19] As noted above, the Federal Circuit thus limited its holding to a bright-line deadline for challenging the terms of a solicitation: "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so *prior to the close of the bidding process* waives its ability to raise the same objection afterwards in a § 1491(b) action in the Court of Federal Claims." *Id.* at 1315 (emphasis added). Indeed, there is no suggestion whatsoever in *Blue & Gold* that its waiver rule applies to anything other than an action challenging the terms of a solicitation. *See* *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1363 (Fed. Cir. 2009) ("In *Blue & Gold Fleet* we held 'that a party who has the opportunity to object to the terms of a government solicitation containing a patent

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error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.' " (quoting *Blue & Gold*, 492 F.3d at 1313)); *Eskridge*, 955 F.3d at 1345 n.5 (explaining *Blue & Gold*, 492 F.3d at 1313, as "holding that a party waives the ability to object to the terms of a solicitation if it fails to do so before the close of the bidding process"). Accordingly, the Court agrees with VS2 that "*Blue & Gold* does not articulate a rigid deadline that inescapably applies whenever an offeror might possibly have lodged its protest before contract award." Pl. Resp. at 5.

But what about the Federal Circuit's subsequent applications of *Blue & Gold*? At oral argument, the Court expressed skepticism – prematurely, as it turns out – of the notion that the *Blue & Gold* waiver rule might apply in situations where there is no bright-line, date-certain filing deadline that a plaintiff could determine in advance (*e.g.*, the proposal ***754** due date for solicitation protests). Oral Arg. Tr. 38-39. In that regard, the Court challenged the government to identify precisely "[w]hen did Plaintiff have to file this protest with this Court?" *Id.* at 38:21-22. The government conceded that "[t]here was not a specific date[,]" *id.* at 38:25, but asserted that the government was not "arguing for anything *per se* here" and that "the lack of a ... concrete firm deadline is not prohibitive." *Id.* at 39:11-14. In response to a follow-up question from the Court, the government relied upon *COMINT* and *Inserso* as the two Federal Circuit decisions that best support the government's position regarding the application of *Blue & Gold* to the facts and circumstances of this case. *Id.* at 39:16-20.

After further review of *COMINT* and *Inserso*, the Court agrees with the government that the lack of a determinate, date-certain deadline does not preclude the application of the *Blue & Gold* waiver rule. Put differently, the fact that VS2 did not know precisely when the government was going to award the contract at issue here to Vectrus – following the first GAO decision – does not preclude the application of the *Blue & Gold* waiver rule. Indeed, there is a fair amount of language in *COMINT* and *Inserso* that generally favors the government's and Vectrus's view. *See, e.g.*, *COMINT*, 700 F.3d at 1382 ("The same policy underlying *Blue & Gold* supports its extension to all pre-award situations."); *id.* at 1383 (citing 4 C.F.R § 21.2 for the position that "[u]nless the basis for the protest becomes apparent later than ten days before the award, the GAO does not permit a disappointed bidder to wait until after the award" and that "[i]t would be incongruous to bar later GAO protests but to permit a later court challenge"); *Inserso*, 961 F.3d at 1352 ("Because a bidder in the small-business competition exercising reasonable and customary care would have been on notice of the now-alleged defect in the solicitation long before the awards were made, Inserso *forfeited its right to raise its challenge by waiting until awards were made*." (emphasis added)).

After further consideration, however, the Court stands by its initial conclusion, expressed during oral argument, that *Blue & Gold* does not preclude VS2's action. In *Inserso*, the Federal Circuit explained its previous decisions as follows:

> In *Blue & Gold Fleet, L.P. v. United States*, we held that "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims." 492 F.3d 1308, 1313 (Fed. Cir. 2007). We have since held that this reasoning "applies to all situations in which the protesting party had the opportunity ***to challenge a solicitation before the award*** and failed to do so." *COMINT Systems Corp. v. United States*, 700 F.3d 1377, 1382 (Fed. Cir. 2012). The Court of Federal Claims has correctly applied this rule in organizational-conflict-of-interest cases, including cases dealing with the disclosure of pricing information during debriefing. *See* *Ceres Envtl. Services, Inc. v. United States*, 97 Fed. Cl. 277, 310 (2011).

Inserso, 961 F.3d at 1349 (emphasis added to *COMINT* quote).

As the Court understands these cases applying *Blue & Gold*, all the Federal Circuit did was shift, until the contract award date, the cut-off for a challenge to a solicitation that would not have been possible prior to the proposal due date. *See* Pl. Resp. at 5-6 (VS2 arguing that "this solicitation-only

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scope has remained from *COMINT* to the more recent *Inserso*").

For example, in *COMINT*, an agency amended the solicitation "after the bidding process closed," but the plaintiff waited until after contract award to protest the amendment. *COMINT*, 700 F.3d at 1382. The Federal Circuit held: "[W]here bringing the challenge prior to the award is not practicable, it may be brought thereafter. But, assuming that there is adequate time in which to do so, a disappointed bidder must bring a challenge to a solicitation containing a patent error or ambiguity prior to the award of the contract." *Id.* Thus, *COMINT* may be read as *expanding* the time in which a solicitation challenge may be filed in this Court where the grounds for the protest did not exist prior to the proposal due date – a common sense proposition given that a plaintiff could not, without the advantage of a time machine ***755** or crystal ball, have known about the basis for its action. On the other hand, the fact that the award date is not known to the offerors does not mean that a prospective plaintiff may adopt a wait-and-see posture. Hence, the Federal Circuit moved the deadline for such solicitation challenges (arising after the proposal due date) to the contract award date even though that precise date may not be known to a would-be plaintiff.

Inserso similarly involved a solicitation challenge. *Inserso*, 961 F.3d at 1350 (holding that "Inserso should have challenged the solicitation before the competition concluded"); *id.* at 1352 ("Because a bidder in the small-business competition exercising reasonable and customary care would have been on notice of the now-alleged defect in the solicitation long before the awards were made, Inserso forfeited its right to raise its challenge by waiting until awards were made.").

Finally, in *Ceres* – a decision the Federal Circuit cited with approval in *Inserso* –this Court clearly addressed a solicitation protest. *Ceres Envtl. Servs.*, 97 Fed. Cl. at 310 (2011) ("If Plaintiff believed that the procedure for the recompetition had to be amended to ensure that all offerors' pricing be released, it had an obligation to raise this argument *prior to the closing date for receipt of proposals*. Plaintiff's attempt to challenge the ground rules of the bidding process after award is untimely." (emphasis added) (citing *Blue & Gold*, 492 F.3d at 1313)).

Although the government understandably points to other decisions from this Court putatively involving protests other than those based upon a challenge to a solicitation, [10] the undersigned will not expand *Blue & Gold* any further than the Federal Circuit already has. In that regard, all of these cases – *Blue & Gold*, *COMINT*, and even *Inserso* – are nothing more than *per se* rules implementing what is otherwise broad, hortatory statutory language that is more appropriately read as generally placing weight on specific considerations in the context of the trial court's deciding whether to issue equitable relief – a decision within its sound discretion – and not as a *per se* restriction on a plaintiff's ability bring claims in the first instance. [11]

None of that is to say that this Court takes any issue whatsoever with the *Blue & Gold* waiver rule, in general, or any of its Federal Circuit progeny. Indeed, even putting aside that this Court is bound to follow all of those decisions – reading them in harmony as best as possible – the waiver rule as applied in the context of a solicitation challenge is, in this Court's view, an eminently practical and a reasonable instantiation of 28 U.S.C. § 1491(b)(3). [12] But, there is an untraversable ***756** gulf between that rule, on the one hand – even as implemented in *COMINT* and *Inserso* – and the wholesale adoption of GAO's timeliness rules, on the other. The latter is what the government, in essence, appears to be asking the Court to do in this case. *See* Def. Resp. at 4; Pl. Resp. at 11. [13] But, the mere fact that the Federal Circuit has cited such GAO timeliness regulations on occasion to explain the policy considerations underlying the *Blue & Gold* waiver rule does not mean that 28 U.S.C. § 1491(b)(3) may be read to import those regulations, verbatim, into the Tucker Act (as amended by ADRA). If Congress wanted to enact such timing constraints, thereby imposing the same or similar GAO rules on this Court, Congress surely knows how to do so. In the absence of such duly enacted legislation, signed into law by the President, this Court will not take an editor's red pen to our jurisdictional statute or the applicable statute of limitations. [14]

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[20] Finally, the factual circumstances at issue here are readily distinguishable from those in *COMINT* and *Inserso*. VS2, in this case, could not have immediately filed suit challenging GAO's October 2020 decision because, as VS2 points out, "GAO's recommending corrective action did not, on its own, guarantee that the Army would implement it." Pl. Resp. at 4. And, while GAO held that VS2's challenge to the Agency's subsequent contract award to Vectrus – *i.e.*, as a result of implementing GAO's recommendation – was untimely, VS2 cannot be said to have sat on its rights. To the contrary, VS2 protested *that* award at GAO within seven days, on December 11, 2020. AR 6472. This Court agrees with VS2 that the fact that GAO ultimately determined that VS2's protest of that award was untimely does not mean that VS2 forfeited its cause of action in this Court pursuant to 28 U.S.C. § 1491(b). In that regard, GAO's timeliness issue must not have been so straightforward, given that, as VS2 points out, GAO's decision was not issued until "much later," Pl. Resp. at 9, on February 25, 2021. AR 6765-72. [15] Following that decision, VS2 proceeded to this Court almost immediately, filing its original complaint here within a week, on March 4, 2021. That is a far cry from the factual scenario in *COMINT*, in which the plaintiff "had two and a half months between the issuance of Amendment 5 and the award of the contract in which to file its protest[,]" which the Federal Circuit held "was more than an adequate opportunity to object" and where the consequence of a successful protest would have been to "restart the bidding process." *COMINT*, 700 F.3d at 1383. Here, there is no point at which VS2 unduly delayed pursuing its claim – let alone by any duration approaching two and half months – nor does VS2 seek an order restarting the bidding process. *ATSC Aviation*, 141 Fed. Cl. at 696 (rejecting application of *Blue & Gold* waiver rule and noting that plaintiff's "protest, if ***757** successful, would neither restart the bidding process nor interrupt a contract execution").

Similarly, in *Inserso*, the Federal Circuit concluded that the plaintiff in that case could have objected to the terms of the solicitation *before proposals were even due*. *Inserso*, 961 F.3d at 1352 ("Had Inserso objected to the solicitation before the submission of final proposals, raising its concern that some bidders might have received information by participating in the full-and-open competition, DISA could have confirmed that an unequal disclosure occurred and provided the non-proprietary debriefing information to all bidders in the small-business competition."). In marked contrast, VS2's action in this Court, challenging the Agency's corrective action (and the subsequent contract award), could not have been raised "before the submission of final proposals." *Id.*

[21] **[22]** Although both Vectrus and the government invite "the Court to weigh the totality of the circumstances," Oral Arg. Tr. 90:2-4, in deciding whether to hold VS2's claims here waived pursuant to *Blue & Gold*, the Court concludes that, aside from the limited circumstances in which the Federal Circuit has done otherwise, any waiver doctrine should be applied in narrowly defined circumstances: in particular, where a prospective plaintiff can determine a precise filing deadline for its complaint. A "totality of the circumstances" test is not predictable or workable and, most importantly, not required by the Federal Circuit. That said, the "totality of the circumstances" are appropriately considered – pursuant to 28 U.S.C. § 1491(b)(3) – in terms of the propriety of injunctive relief in any given case. In declining to find VS2's action here waived, the Court is not suggesting that timing issues are irrelevant. Rather, all the Court holds is that the *Blue & Gold* waiver rule does not apply here. To the extent that the timing of VS2's protest may have an insalubrious impact on the procurement process, that is a question for this Court to consider with regard to permanent injunctive relief, but does not require the Court to find VS2's claims waived.

VI. GAO's *VECTRUS* DECISION IS ERRONEOUS AS A MATTER OF LAW

As described above, GAO, in sustaining Vectrus's protest, concluded that where "a firm offers a cap or ceiling on a particular cost that effectively limits the government's liability and shifts liability for the cost to the offeror, any upward adjustment to the capped cost is improper." AR 6391 (citing *Affordable Engineering Services, Inc.*, B-407180.4, 2015 CPD ¶ 334, 2015 WL 7450123 (Aug. 21, 2015)). Rather, according to GAO, "the only appropriate consideration for the agency is whether the offeror may be found responsible in light of the proposed assumption of liability." *Id.* In this case, GAO determined that the Agency "made what amounts to two unwarranted assumptions: first that Vectrus was not actually offering what it had proposed; and second, that Vectrus was not financially capable of absorbing the cost savings it had proposed, even though there is nothing in the record to show that the agency ever made a responsibility determination with

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respect to Vectrus." *Id.* Accordingly, GAO held that "the agency improperly added $19,719,898 to the Vectrus cost/price proposal for evaluation and source selection purposes" and that, "absent the agency's error, Vectrus offered the lowest evaluated cost/price among the three competitive range offerors[.]" *Id.*

Instead of recommending that the Agency *both* reevaluate its award decision "absent the agency's evaluation error" (*i.e.*, after removing the cost adjustment) *and* consider the assessed performance risk triggered by the proposed cost absorption, GAO "recommend[ed] that the agency issue the task order to Vectrus as the apparent lowcost/price acceptable offer[ ]" – thereby effectively flipping the award. AR 6392; *see also* AR 6766-67 (GAO explaining its earlier decision "that Vectrus was entitled to receive the task order based on the express terms of the RFP"). In GAO's view, "[a]ny question concerning a firm's ability to perform the contract in light of a capped cost that is below the actual cost is a matter of the firm's responsibility." AR 6771 (citing GAO decisions).

***758 [23]** VS2 argues that the Agency improperly switched awardees due to a flawed GAO decision that, in effect, "irrationally foisted back onto the Army the risk from Vectrus's Business Policy Decision that the Army had reasonably identified and taken measures to mitigate." Pl. Resp. at 13. According to VS2, "[t]he result was a near-bright-line rule that barreled over considerations such as the Solicitation's instructions and whether the Army even found the absorption desirable or feasible." Pl. MJAR at 26. The Court agrees with VS2 and concludes that GAO's decision was erroneous as a matter of law, that the Agency thus irrationally reversed its position based upon GAO's decision, and that the resulting contract award to Vectrus failed to comply with the Solicitation.

To understand where, in the Court's view, GAO and the Agency went wrong, the Court must first explain the rationale underlying the FAR's requirement for a cost realism analysis generally, as well as the specific implications of the analysis performed in this case.

The FAR defines the term "Cost realism" as meaning that an offeror's proposed costs:

> (1) Are realistic for the work to be performed;
>
> (2) Reflect a clear understanding of the requirements; and
>
> (3) Are consistent with the various elements of the offeror's technical proposal.

FAR 2.101. The requirement to conduct a cost realism analysis is contained in several FAR provisions. FAR 15.305, for example, provides that "[w]hen contracting on a cost-reimbursement basis, evaluations shall include a cost realism analysis to determine what the Government should realistically expect to pay for the proposed effort, *the offeror's understanding of the work, and the offeror's ability to perform the contract*." FAR 15.305(a)(1) (emphasis added). Similarly, FAR 15.404-1 provides that "[c]ost realism analysis" is used "to determine whether the estimated proposed cost elements are realistic for the work to be performed; *reflect a clear understanding of the requirements*; and are consistent with the unique methods of performance and materials described in the offeror's technical proposal." FAR 15.404-1(d)(1) (emphasis added).

The Solicitation reflected the FAR's requirements for a cost realism analysis in numerous provisions. Section M.4 ("Evaluation Methodology"), for example, provides that "[t]he Cost/Price Factor will be evaluated for cost realism and price reasonableness." AR 145 (RFP § M.4.1). The Solicitation further provides:

> The proposal must clearly and unambiguously reflect the Offeror's intended approach and establish cost credibility. Any inconsistency, whether real or apparent, between promised performance and proposed cost must be adequately explained in the proposal. An offeror's failure to adequately explain an inconsistency between promised performance and cost may result in a finding of Technical Unacceptability or a finding that a proposed cost is unrealistic for the work to be performed.

AR 145 (RFP § M.4.2); *see also* AR 125 (RFP § L.4.1.3), AR 135 (RFP § L.5.4.1.3), AR 135-136 (RFP § L.5.4.1.6 (requiring that "[t]he cost/price proposed must be consistent with the Offeror's Technical Proposal" and cautioning that while "[c]onsistency between the Offeror's Cost/Price and

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Technical Proposals reflects the Offeror's ability to perform the effort required at the proposed amount[,]" "[a]ny significant inconsistencies, if not adequately explained in the proposal, raise a fundamental question as to the Offeror's inherent understanding of the work required and its ability to perform the contract")).

There are a number of other references to cost realism in the Solicitation. *See, e.g.*, AR 145-46 (RFP § M.4.4.2) ("The Cost/Price Factor will be evaluated for price reasonableness and cost realism, but it will not be assigned an adjectival rating."). Section M.5.3.2 specifically covers "Cost Realism Analysis" and, reflecting the FAR's language, provides that it "is the process of independently reviewing and evaluating specific elements of the Offeror's proposed cost elements to determine the following: whether the estimated proposed cost elements are realistic for the work to be performed; whether the proposed cost elements reflect a clear understanding of the requirements; and whether the proposed cost elements are consistent with the unique methods of performance described in the Technical Proposal." AR 149.

***759** Of particular significance here, the Solicitation warned offerors "that the Government has concerns with the potential for post-award performance problems if Offerors propose unrealistically low costs" and that "[t]herefore, the Government reserves the option of rejecting a proposal if, in the exercise of its judgment, it determines that an Offeror's cost proposal is unrealistically low, regardless of technical merit and/or evaluated costs." AR 149 (RFP § M.5.3.2.1). Indeed, the Solicitation contemplated precisely what happened in this procurement:

> For example, if as a result of the Cost Realism analysis it becomes clear to the Government that *any necessary upward MPC adjustments are so substantial that they present an unacceptable risk* (notwithstanding an assessed rating of acceptable under the technical factor), the proposal may be rejected and not further considered for award. Therefore, failure of the Offeror to establish the credibility of its proposed costs may result in a MPC adjustment being made to the costs proposed, ***and/or the proposal being rejected as unrealistically low and not further considered for award***.

Id. (emphasis added).

Thus, pursuant to both the FAR and the Solicitation, there are two purposes of a cost realism analysis, necessitating distinct, albeit related, assessments.

[24] **[25]** **[26]** *First*, "[t]he primary purpose of cost realism analysis ... is to prevent offerors from gaining an advantage over competitors by proposing an unrealistically low estimated cost." R. Nash & J. Cibinic, *Cost Realism Analysis in Negotiated Fixed Price Contracts: Confusion at the GAO or a New Limitation on Buy-Ins?*, 4 No. 10 Nash & Cibinic Rep. ¶ 61 (Oct. 1990). The concern is that "[s]ince the contractor will be reimbursed on the basis of costs incurred, an offeror will not suffer economic consequences by proposing an estimated cost lower than its expected cost of performance. Thus, the proposal offering the lowest *estimated* cost may not necessarily be the proposal which will result in the lowest cost of *performance*." *Id.* (emphasis in original). [16]

[27] *Second*, cost realism is "used to determine whether offerors *understand the contract requirements* and a finding of lack of understanding leads to downgrading of the proposal." R. Nash & J. Cibinic, *Cost Realism Analysis in Cost Reimbursement Contracts: What are the Rules of the Game?*, 5 No. 7 Nash & Cibinic Rep. ¶ 40 (July 1991) (emphasis in original).

[28] **[29]** Accordingly, and just as the Solicitation provides here, *see* AR 149 (RFP § M.5.3.2.1), [17] where an agency determines that an offeror's proposed or estimated cost is unrealistically low, an agency may not only make an upward "most probable cost" adjustment – referred to as an "MPC" – but also may determine that the offeror's proposal represents an unacceptable risk to performance.

[30] **[31]** But, what about a case in which an offeror proposes to cap its costs? While an offeror may, indeed, propose contractually binding cost caps to avoid an upward MPC adjustment, the offeror cannot rely upon such caps to escape the required risk assessment. That is because where an offeror proposes to cap its cost for one or more cost-reimbursement CLINs, the offeror effectively converts them to firm-fixed price CLINs (*i.e.*, where the actual costs of expected performance are otherwise projected to exceed the

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cost cap).[18] In such a case, the FAR's ***760** concern is that the selected contractor ultimately will attempt to achieve profitability via substandard performance; a cost realism analysis must assess that risk. *Advanced Tech. Sys., Inc.*, B-215124, 85-1 CPD ¶ 315, 64 Comp. Gen. 344, 348 (Mar. 18, 1985) ("Assuming that higher skilled, and presumably higher paid, contractor personnel can perform tasks at a higher speed, we think that a contractor, who submitted unrealistically low proposed costs, would be forced by the caps to propose less skilled, lower paid and slower personnel in order to stay within the ceilings."); *cf.* R. Nash & J. Cibinic, *Cost Realism Analysis in Negotiated Fixed Price Contracts: Confusion at the GAO or a New Limitation on Buy-Ins?*, 4 No. 10 Nash & Cibinic Rep. ¶ 61 (Oct. 1990) ("In fixed price contracts, the purpose to be served by conducting a cost realism analysis is to protect the Government from encountering problems in performance caused by awarding a contract based on an unrealistically low price.... Award of a contract at an unrealistically low price should only be made with a knowledge of the risks involved."); V. Edwards, *Price Realism: A Primer*, 28 Nash & Cibinic Rep. NL ¶ 1 (Jan. 2014) ("There are two parts to price realism analysis: (1) the analysis done to determine whether the proposed price is high enough to cover the cost of performance and (2) the assessment of the risk arising from a below-cost price and the effect of that risk on nonprice value.").[19]

In this case, the Agency, during discussions, expressed significant concerns with the lack of consistency between Vectrus's (and its proposed subcontractors') cost/price and technical volumes. *See, e.g.*, AR 2853-58 (EN 1 & EN 2); AR 2868-75 (EN 7 – EN 9). In response, Vectrus submitted questions to the Agency, including several to better understand the Agency's view of Vectrus's proposal to cap [* * *] FTEs at a cost to the government of $[* * *] per hour. AR 2886. In particular, Vectrus asked:

> (a) If adequately explained by Vectrus in our revised Assumptions narrative and Cost/Price model, is it an acceptable Business Policy Decision to propose a selected number of FTEs that will be invoiced to the Government at the deep discount described above (and recognizing that Vectrus would still compensate all employees IAW the SCA and CBAs?
>
> (b) With regard to (a) above, is it also an acceptable Business Policy Decision to propose to forgo hiring such deeply discounted FTEs, with the understanding that: (1) mission support would not be negatively impacted, (2) we are basing our Business Policy Decision on documented, historical experience providing equivalent support at Fort Bragg, and (3) should Vectrus at some point need to hire any or all of these FTEs that Vectrus would bear the full cost of compensating such employees IAW the SCA or CBA[s]?

AR 2886 (Question #2).

The Agency answered Vectrus's questions, expressing, in the process, several concerns regarding the implications of Vectrus's proposed approach to the ENs. For example, the Agency noted that while Vectrus "has ***761** proposed a cost credit [that] well exceeds the amount of fee proposed[,]" it "has not established cost credibility and/or shown that the proposed costs are realistic for the promised performance." AR 2887. The Agency further observed that there was an apparent "inconsistency between the promised performance in the technical volume and the costs proposed[.]" *Id.* The Agency particularly focused on the fact that the offeror suggested "forgoing the hiring of these [* * *] FTE[s]." *Id.* With respect to question (b), above, the Agency responded in the negative (and in no uncertain terms). *Id.* ("No, Offerors are required to meet the minimum requirements of the RFP.").

In addressing the ENs in a new "Cost/Price Volume IV," Vectrus revised its "Cost proposal so that the staffing priced in the Cost/Price Volume now aligns with the staffing in the Technical Volume ...." AR 4400. In particular, Vectrus "adjusted [its] Cost proposal to reflect that the SCA/CBA labor rates ... are in accordance with ... the RFP by increasing the labor rate ... from $[* * *] to the full CBA wage." *Id.*; *see* AR 4401 ("Vectrus further acknowledges that all employees will be paid the SCA/CBA labor rate as published in the current SCA/CBA."). Instead of proposing select labor rates reduced to near zero, Vectrus instead made a "Business Policy Decision" in the form of "a cost-reduction benefit to the Government, wherein Vectrus [proposed to] absorb[ ] a portion of the costs, and the associated financial risk." AR 4401. Thus, according to Vectrus, "there is no disconnect between our Cost/Price Volume and Technical Volume." *Id.* Vectrus asserted that "[t]o absorb these costs internally, Vectrus will use our Corporate proceeds." *Id.*; *see* AR 4402 ("Vectrus is a financially sound and transparent publicly traded corporate with a strong cash position; as such, our company is fully capable of absorbing the cost of this Business Policy Decision."); *see also* AR 4404 ("Vectrus formally acknowledges and accepts the risks

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and responsibilities associated with this decision."). Vectrus assessed a total cost reduction of more than $22 million. [20]

Notwithstanding Vectrus's apparently bald assertion that its Business Policy Decision "will not impact our operational approach to managing and executing the ... PWS technical requirements and achieving the associated ... performance standards[,]" AR 4421, the Agency's cost realism analysis reasonably reached a different conclusion. *See* AR 5536-5568. That analysis "determined the proposed Business Policy Decision Cost Credit to be unrealistic for this effort" for several reasons. AR 5566. First, the Agency was reasonably concerned about whether Vectrus intended to "forgo[ ] hiring the [* * *] FTE[s] associated with [the] Cost Credit proposed[,]" noting that "[t]his creates an inconsistency with the technical volume" and that such a "significant" inconsistency "raise[s] a fundamental question as [to] the Offeror's inherent understanding of the work required and its ability to perform the contract." *Id.* In that regard, the Agency's cost realism analysis correctly cited section M.5.3.2.1 of the RFP in assessing "the potential for post-award performance problems if Offerors propose unrealistically low costs." *Id.* Second, and in line with that same Solicitation provision, the Agency reasonably concluded that Vectrus's Business Policy Decision posed risks of performance problems: "If the Offeror does in fact plan on forgoing the hiring of [* * *] FTE[s] ... *this poses a risk to the government and a concern for post-award performance problems*." *Id.* (emphasis added). Third, the Agency found "the proposed credit unrealistic as it would not be covered by the Offeror's proposed fee if issues arose during execution." *Id.* This, too, is properly understood as a concern with performance risks, as the point is that the proposed credit – or cost caps – likely will place Vectrus in a significant loss position unless Vectrus negatively adjusts its performance to stay profitable, hardly an unreasonable or far-fetched concern.

***762** **[32]** To account for the risks of the Business Policy Decision, the Agency made "a probable cost adjustment ... in the amount of the entire credit, $17,839,964." AR 5566; *see* AR 5589 ("Vectrus [sic] proposal contained a discount labeled as a Business Decision Cost Credit that exceeded the fee from the entire contract. It was determined that the Government needed a Probable Cost Adjustment to make their offer more realistic."). [21] The upward MPC adjustment is not itself at issue here, as the Court agrees with GAO that the Agency erred in initially making that adjustment. That is because, as GAO correctly explained, "where a firm offers a cap or ceiling on a particular cost that limits the government's liability and shifts liability for the cost to the offeror – and no other issue calls into question the effectiveness of the cap – any upward adjustment to the capped cost is improper." AR 6386. GAO, however, further concluded – incorrectly – that "[a]ny question concerning a firm's ability to perform the contract in light of a capped cost that is below the actual cost is a matter of the firm's responsibility rather than a matter to be considered by the agency in its cost realism evaluation." *Id.* Regarding that second conclusion, the Court holds that GAO erred as a matter of law.

[33] **[34]** As demonstrated above, the FAR's required cost realism analysis involves the assessment of performance risk, particularly where an offeror proposes to cap its costs such that it risks incurring a significant loss. In other words, where an agency determines that an offeror's proposed costs are unrealistically low for the contemplated performance, the agency must account for that assessment in at least two ways: the agency must consider whether to adjust the proposed costs upwards for evaluation purposes, and it must consider whether the proposed costs are indicative of performance risk. *See* AR 149 (RFP § M.5.3.2.1).

[35] With respect to an MPC adjustment, the agency cannot simply accept the offeror's proposed costs because, as GAO explained, "an offeror's proposed costs are not dispositive in a cost-reimbursement environment since, regardless of the costs proposed, the government generally will be liable to the contractor for all allowable and allocable costs incurred in connection with the performance of the contract." AR 6386.

[36] **[37]** But the risk of higher costs during performance is not the FAR's only concern. Thus, an agency must assess not only whether an MPC adjustment is necessary to cure unrealistically low proposed costs but also – as GAO itself acknowledged in passing in this case – whether such unrealistically low costs reflect a deficiency in the offeror's "understanding of the requirements." AR 6385 (citing FAR 15.404-1). Where an offeror agrees to cap costs during performance and suggests the possibility of having to absorb a significant loss, an agency cannot ignore potential performance risks; if anything, an agency's concerns should be exacerbated. That is exactly what occurred here: the Agency raised distinct concerns about Vectrus's performance risk. *See* AR 6385 (GAO's acknowledging the Agency's concern that Vectrus's "assumption of liability would be borne out during contract performance, especially in view of the fact that the amount of the costs to be absorbed by

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Vectrus exceeded the amount of the firm's proposed fee"). GAO's ultimate decision and recommendation, however, all but compelled the Agency to ignore those findings in the administrative record. *See* AR 6392.

Moreover, while GAO 's decision at issue in this case relied upon *Affordable Eng'g Servs., Inc.*, B-407180.4, 2015 CPD ¶ 334, 2015 WL 7450123 (Aug. 21, 2015), VS2 correctly observes that GAO erroneously omitted a key aspect of that precedent. Pl. MJAR at 26-27 ("The result was a near-bright-line rule that barreled over considerations such as the Solicitation's instructions and whether the Army even found the absorption desirable or feasible."). In *Affordable Engineering*, the protester ("AES") argued that "the Navy's ***763** cost realism analysis was improper because it failed to consider the performance risk associated with [the awardee's] proposing indirect rate caps that could result in a loss contract." *Affordable Eng'g*, 2015 WL 7450123 at *4. In rejecting AES' argument, GAO explained as follows:

> Our Office has long held that as a general matter, a decision about an awardee's ability to perform a contract at rates capped below actual costs is a matter of an offeror's responsibility. *See, e.g.*, *Highmark Medicare Servs., Inc., et al.*, B–401062.5 et al., Oct. 29, 2010, 2010 CPD ¶285 at 28; *MCT JV, supra*, at 13. It is only where a solicitation provision expressly instructs offerors not to submit unrealistically low costs that the risk stemming from an offeror's decision to propose capped rates is a matter for the agency's consideration in the context of its evaluation of proposals and source selection decision process. *See MCT JV, supra*.

Id. at *4-*5 (footnote omitted) (discussing *MCT JV*, B-311245.2, 2008 CPD ¶ 121, 2008 WL 2907033, *12-*13 (May 16, 2008)). GAO further distinguished "the solicitation at issue" in *Affordable Engineering* as "not contain[ing] any of the express and unique warnings and language set forth in the solicitation at issue in *MCT JV*." *Id.* at *5 (noting that "AES has not alleged that the RFP contained any express warnings or instructions not to submit unrealistically low costs as were present in *MCT JV*"). Thus, GAO "disagree[d] with AES that the agency was required to consider the performance risk associated with [the] capped indirect rates, and [found] that the agency properly treated the matter of [the] indirect rate caps as a matter of responsibility." *Id.* In GAO's *Vectrus* decision at issue here, none of that language from *Affordable Engineering* is mentioned, let alone applied. AR 6386-92.

[38] Contrary to GAO's decision in *Vectrus*, GAO's *Affordable Engineering* decision simply does not stand for the proposition that "[a]ny question concerning a firm's ability to perform the contract in light of a capped cost" is *per se* only "a matter of the firm's responsibility rather than a matter to be considered by the agency in its cost realism evaluation." AR 6386 (citing *Affordable Eng'g*, 2015 WL 7450123 at *6). The Court is at a total loss as to how GAO in *Vectrus* extracted such a *per se* rule.

[39] To make matters worse, GAO's decision in *MCT JV* demonstrates, if anything, that GAO erred in *Vectrus*. In *MCT JV*, the awardee similarly proposed cost or rate caps, and GAO correctly held that "when offerors propose such caps, and no other issue calls into question the effectiveness of the cap, upward adjustments to capped costs are improper." *MCT JV*, 2008 WL 2907033 at *10. On the other hand, GAO concluded:

> [T]he agency could not simply ignore the risk presented by these capped rates in concluding that [the awardee's] proposal was the best value. As noted previously, the solicitation expressly admonished offerors not to propose unrealistically low costs because of [the Navy's] concern that a proposal with unrealistically low costs due to an offeror's decision to submit a proposal below its anticipated costs "may cause problems for the Navy as well as the contractor during contract performance."

Id. at *11 (quoting the RFP at issue in that case). While the Navy argued that the awardee's "ability to perform at its capped rates was solely a matter concerning [its] responsibility," GAO rejected that argument, holding that "where, as here, the solicitation expressly instructs offerors not to submit unrealistically low costs or prices, the risk stemming from an offeror's decision to propose unrealistically low capped rates is a matter for the agency's consideration in the context of its evaluation of proposals and source selection decision process." *Id.* Accordingly, GAO determined that the agency erred in failing to consider the awardee's "capping of

its rates in that context" as "inconsistent with the terms of the solicitation." *Id.*

[40] Critically, the RFP language upon which GAO relied in *MCT JV* is ***nearly identical to the Solicitation language contained in the RFP at issue in this case***. *Compare MCT JV*, 2008 WL 2907033 at *3 ("[A] contract awarded to a contractor submitting an unrealistically low cost/price proposal (whether resulting from a decision on the part of the contractor to submit a price below anticipated costs ... or other circumstances) may cause problems for the Navy as ***764** well as the contractor during contract performance.... Accordingly, Offerors are cautioned that SHOULD THE GOVERNMENT, IN THE EXERCISE OF ITS JUDGMENT, DETERMINE THAT A COST PROPOSAL SUBMITTED IN RESPONSE TO THIS SOLICITATION IS UNREALISTICALLY LOW, THE GOVERNMENT MAY REJECT THE PROPOSAL, REGARDLESS OF ITS TECHNICAL MERIT AND/OR EVALUATED COST TO THE GOVERNMENT." (capitalization in original)), *with* AR 149 (RFP § M.5.3.2.1) (warning offerors "that the Government has concerns with the potential for post-award performance problems if Offerors propose unrealistically low costs" and that "[t]herefore, the Government reserves the option of rejecting a proposal if, in the exercise of its judgment, it determines that an Offeror's cost proposal is unrealistically low, regardless of technical merit and/or evaluated costs"); *see also* Oral Arg. Tr. 13:9-10 (government agreeing that RFP § M.5.3.2.1 "is substantially similar" to the solicitation language at issue in GAO's *MCT JV* decision); *id.* at 14:24-25 – 15:2 ([Government Counsel]: "We do think that the solicitation provision in *MCT JV* is much closer the solicitation provision in this case. In *Affordable*, there was not ... a very similar situation."). [22]

The Court rejects, as a matter of law, the *per se* rule articulated in GAO's decision in *Vectrus* that would limit an agency's consideration of cost or rate caps only under the rubric of responsibility. Such a rule is inconsistent with the FAR's plain language – not to mention of the primary purposes of a cost realism analysis – and improperly restricts an agency with otherwise reasonable concerns about the impact of cost caps upon performance. The Court further finds that the Solicitation at issue in this case is nearly identical to the RFP language at issue in the *MCT JV* decision and, thus, at a minimum, it was irrational for GAO to ignore its own compelling reasoning in *MCT JV*.

GAO in *Vectrus* further concluded that the Agency erred in making "an unwarranted assumption about what Vectrus might do during performance based on the informal – clearly non-binding – exchange with Vectrus ... that occurred during discussions." AR 6389. According to GAO, the Agency's assumption was "directly contradicted by the actual contents of the Vectrus revised proposal." *Id.; see also* AR 6390 (GAO concluding that the Agency "erred in making an unwarranted assumption about Vectrus's potential behavior during contract performance that was directly at odds with the contents of Vectrus's proposal"). But GAO's determination that "[i]t necessarily follows that this rationale does not provide a reasonable basis for the application of the upward cost adjustment" is a non-sequitur because the assessed probable cost clearly was not the only concern the Agency articulated. AR 6390. Rather, the Agency was reasonably concerned about Vectrus's performance risk due to the cost caps.

[41] If anything, GAO erroneously concluded that Vectrus's proposal somehow committed Vectrus, during performance, to hire all of the FTEs for which Vectrus originally proposed [* * *] costs and then – when the Agency challenged that strategy during discussions – proposed a cost cap to mitigate the impact of the actual costs of those same FTEs. The Agency's assessment of whether such cost caps would incentivize Vectrus to simply cut corners during performance in order to avoid the caps – and thereby maintain profitability – was not only reasonable but required pursuant to the FAR, the terms of the Solicitation, and GAO's own precedent. That is particularly true given the government's admission that "there is no actual requirement [for Vectrus] to use all" of the proposed FTEs. [23] Oral Arg. Tr. 29:15-17. ***765** That is precisely the concern the Agency had – *i.e.*, that, as government counsel conceded, if Vectrus "do[es]n't hire those ... [* * *] FTEs, *and their performance is still satisfactory*, then *maybe* they don't have to absorb that cost after all...." *Id*. at 30:3-5 (emphasis added). Both Vectrus and now the government are trying to have their cake and eat it too, but neither adequately reconciles the idea that Vectrus will perform at the required level – consistent with the government's response to Vectrus's EN question, *see* AR 2887 – and the fact that nothing compels Vectrus to do so, a problem compounded by the negative financial incentive of the proposed cost caps. [24]

[42] **[43]** The basic point is straightforward. When an offeror proposes unrealistically low costs for a particular performance, the agency must consider whether it will actually obtain such low costs during performance or whether

the offeror has proposed low costs because it does not in fact understand the work to be performed. The first question goes to cost risk, the second to performance risk. When, on the other hand, an offeror projects costs realistically, but then agrees to cap the costs actually billed to the government, the cost risk itself may go away (*i.e.*, an upward MPC adjustment is improper), but the performance risk either remains or is even amplified. GAO's decision in *Noblis, Inc.*, B-414055, 2017 CPD ¶ 33, 2017 WL 549174 (Feb. 1, 2017), is particularly instructive. In that case, the protester argued "that it was improper for the [source selection authority] to consider performance risk beyond making a cost realism adjustment." *Id.* at *11. In particular, the protester complained "that the agency penalized it twice when it upwardly adjusted the protester's proposed costs to account for the firm's low labor rates and when the SSA considered the firm's low labor rates as evidence of the protester's performance risk." *Id.* In the protester's view, the agency's cost adjustment "eras[ed] any risk in [the protester's] alleged low labor rates." *Id.* GAO disagreed, concluding that "[t]he agency's upward adjustment of Noblis' proposed costs did not erase the performance risk associated with low labor rates. As provided for in the solicitation, the agency used the results of the cost analysis to consider performance risk." *Id.* If an upward MPC adjustment does not erase performance risk, *a fortiori* such risks remain – if, indeed, they are not exacerbated – where, as here, no upward adjustment is permitted, and the offeror essentially proposes to perform the contract at a significant loss.

While GAO effectively tied the Agency's hands in recommending that a new award be made to Vectrus, the government argues that "here, the Army *did* consider the risk stemming from Vectrus's proposed cost absorption and did not consider it necessary to remove Vectrus from the competition for unacceptable performance risk." Def. MJAR at 24 (emphasis in original) (citing AR 5958). There are at least three problems with that contention. The first is the government's citation in support of that assertion: the cite is to the Agency's GAO brief. *Id.* The government (correctly) conceded at oral argument that the GAO brief constitutes non-contemporaneous, *post hoc* documentation, *see* Oral Arg. Tr. at 18:21-23, and thus the Court would discount it even if it tended to support the government's position, which it does not. The second problem, in that regard, is that while the Agency in its GAO brief asserted that "Vectrus has not shown that the Army removed Vectrus from the competition for unacceptable performance risk[,]" AR 5958 – which apparently is the part of the brief the government intended to rely upon, *see* Oral Arg. Tr. at 19:1-6 – that merely begs the question whether the Agency *would have* removed Vectrus from the competition for unacceptable performance risk in lieu of the MPC adjustment that GAO found improper ***766** (and concluded could be considered only under responsibility). Indeed, on the very same page of the Agency's GAO brief, the Agency asserts that it made the adjustment, in part, as a measure of, or to compensate for, performance risk. AR 5958 (Agency noting several concerns with Vectrus's proposal, including that the "acceptance of a loss 'would not be covered by the Offeror's proposed fee if issues arose during execution[,]' " and that its "concerns were both supported by the procurement record and reasonable" (quoting AR 5566)). The third problem with the government's contention is that GAO's second decision in this matter undermines it entirely, insofar as GAO rejected VS2's argument "that the agency was required to take into consideration the risk that VS2 maintains is inherent in Vectrus's proposed approach to absorb some of the costs of performance." AR 6771. In other words, GAO implicitly concluded that the Agency did *not* take such risk into consideration when following GAO's recommendation to award the contract to Vectrus, and GAO explicitly concluded that the Agency did not have to do so. *Id.* (clarifying that, in its first decision, GAO held that capped costs may be considered only as "a matter of the firm's responsibility" and that [a]pplying that rule in the Vectrus case, we concluded that ... in the absence of the upward cost adjustment, Vectrus was entitled to issuance of the task order under the express terms of the RFP").

The upshot is that, contrary to GAO's decisions in this procurement, the Agency must consider whether Vectrus may receive a contract award pursuant to Section M.5.3.2.1 of the Solicitation and any other applicable cost realism or related provisions, *e.g.*, AR 145 (RFP § M.4.2) ("An offeror's failure to adequately explain an inconsistency between promised performance and cost *may result in a finding of Technical Unacceptability*" (emphasis added)). In undertaking that analysis, the Agency must consider not only its previous cost realism findings already in the administrative record, but also the magnitude of the MPC adjustment to the Vectrus proposal that GAO correctly found that the Agency was not permitted to make when comparing the offerors' likely costs. To the extent findings in the technical evaluation are inconsistent with the assessed performance risks, the Agency must revisit the former or otherwise reconcile the findings.

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[44] **[45]** **[46]** **[47]** Given the Court's conclusions above and contrary to the government's argument, *see* Def. MJAR at 24, Federal Circuit precedent does not require that this Court simply defer to GAO's decision in *Vectrus* or the Agency's reliance upon it. In that regard, the Court agrees with (now-Senior) Judge Wolski's decision in *CBY Design Builders v. United States*:

> What is different in cases when an agency follows a GAO recommendation is not that a decision is being reviewed for rationality, but *whose* decision matters in this review. When the relevant procurement official (usually the contracting officer) decides to adopt the views of the GAO after a protest has been heard by that body, this agency decision is not considered inherently unreasonable (for departing from the agency's previous position) nor invulnerable (under the shield of GAO authority), but is instead measured by the rationality of the recommendation it follows. Instead of deferring to the *initial* agency decision, and re-reviewing the protest that was brought in the GAO by scrutinizing the rationality of the initial decision, we defer to the *second* agency decision, and scrutinize the rationality of the GAO's resolution of the protest it heard. But the review standard does not change because of the GAO's involvement.

105 Fed. Cl. 303, 339 (2012) (emphasis in original). "Since the amount of deference given to an agency decision under the 'arbitrary and capricious' standard of review does not change when GAO denies a protest of the decision, or when GAO sustains a protest but its recommendation is not followed, it is hard to see how this deference would be altered by an agency's decision to follow a GAO recommendation." *Id.* at 340. Thus, "[n]o 'special' amount of deference, covering questions of law as well as the ultimate decision being reviewed, can be gleaned from the three Federal Circuit precedents concerning the review of such corrective actions." *Id.* (citing *Turner Constr.*, 645 F.3d at 1383–87, ***767** *Centech Grp., Inc.*, 554 F.3d at 1036-40, *Honeywell*, 870 F.2d at 647-49).

[48] **[49]** **[50]** In sum, "one cannot conclude that the Court must defer to GAO's views on questions of law, such as the interpretation of a solicitation" or FAR provisions. *CBY Design Builders*, 105 Fed. Cl. at 340 (discussing *Honeywell*). As in *CBY Design Builders*, the Court "does not find the numerous references in opinions to the 'deference' to be given GAO decisions in the procurement area as supporting the ceding to GAO of our normal role in deciding questions of law." 105 Fed. Cl. at 341. [25]

[51] **[52]** **[53]** To reiterate, the Court concludes that GAO's decision in *Vectrus* is erroneous as a matter of law insofar as GAO ignored binding FAR and Solicitation provisions, in addition to GAO's own precedent. While GAO correctly recommended that the Agency remove its upward MPC adjustment to Vectrus's proposal, GAO unreasonably recommended an award to Vectrus, essentially directing the Agency to ignore the performance risk the Agency reasonably already had assessed against Vectrus due to its proposed cost caps. GAO's recommendation that the Agency simply flip the award to Vectrus was, at a minimum, irrational and cannot stand. Finally, given the magnitude of the loss Vectrus may incur if it were awarded the contract – something GAO all but precluded the Agency from considering in the *Vectrus* decision – the Court concludes that the Agency must revisit and reconsider its "check-the-box" responsibility determination in light of the Court's findings, *supra*. [26]

VII. VS2 WAIVED ITS CHALLENGE TO VECTRUS's LABOR CATEGORY SUBSTITUTIONS AND SUFFERED NO PREJUDICE IN ANY EVENT

VS2 argues that Vectrus improperly shifted required labor categories specified in the Solicitation "to lower-paying categories." Pl. MJAR at 34. As a result, according to VS2, "the Army should have rejected Vectrus's proposal as an unacceptable deviation from the Solicitation's material terms or at least adjusted Vectrus's probable costs to erase the implausible savings." *Id.* (concluding that "[e]ither choice would have left VS2 as the lowest-price offeror and winner of the competition").

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To be sure, VS2 – in its briefs and during oral argument – helpfully explained how Vectrus selected and substituted lower-cost labor categories in lieu of those specified in the RFP's spreadsheets that offerors were required to complete. Pl. MJAR at 35-37; Oral Arg. Tr. 59:4-61:9; AR 4598. While the Court agrees that a number of RFP provisions ***768** appear to preclude the substitution of specified labor categories with those of an offeror's choosing, *see, e.g.*, AR 129-30 (RFP § L.5.2.1.1(c)), AR 135 (RFP § L.5.4.1.2), Vectrus asserts that it only had to "propose[ ] the required minimum hours for the effort" but was otherwise free to alter the labor mix so long as its proposed staffing approach was adequately explained. Intv. Resp. at 19-22.

[54] After reviewing the various relevant Solicitation provisions the parties cited, the Court concludes that, at a minimum, the RFP contained a patent ambiguity regarding whether offerors were permitted to make labor category substitutions. To the extent that the Agency ultimately decided that Vectrus's approach was permissible, VS2's challenge essentially seeks to vindicate its (now-)preferred reading of the Solicitation and, therefore, is untimely. *Blue & Gold*, 492 F.3d at 1313.

Moreover, the Court agrees with Vectrus that "if what [it] did was impermissible, then VS2's own proposal did the impermissible" as "VS2 ***also*** proposed variations to the staffing requirements outlined in [the RFP's] TD-01 [spreadsheet]." Intv. Resp. at 22 (emphasis in original) (citing AR 3118); *see also id.* at 24 (arguing that "VS2 casts stones in a glass house such that if Vectrus's approach shatters, so too must VS2's"). Indeed, VS2's counsel conceded during oral argument that VS2 likewise substituted certain labor categories for those specified in the Solicitation. *Id.* at 67:4-20. At least one such substitution was substantively indistinguishable from the approach Vectrus took. *Id.* at 68:25-69:4. VS2 responds that what matters is the degree of substitutions; that is, Vectrus did it more. *Id.* at 68:25-69:8. There is some facial appeal to VS2's point insofar as Vectrus appears, in fact, to have benefited from the substitution strategy a great deal more than VS2. But VS2's attempt to steal a base – that is, skipping over an essential (but faulty) premise of its argument – must be rejected. The simple fact is that VS2 cannot now complain about Vectrus's and the government's interpretation of the Solicitation when VS2 relied upon the very same interpretation when preparing its proposal. *Id.* at 71:19 – 74:5 (discussing VS2's substitutions).

Whether that defect in VS2's argument is characterized as waiver or lack of prejudice – either way – the Court rejects VS2's position with regard to labor category substitutions. *See Fairbanks Assocs.-Request for Reconsideration*, B-221374, 86-2 CPD ¶ 172, 1986 WL 63875, *5 (Aug. 11, 1986) ("Thus, it is clear from the record that the protester did not rely on its interpretation of the cost ceiling in calculating its proposed price. Accordingly, the protester's contention that it was prejudiced due to its interpretation of the cost ceiling is without merit."); *cf.* *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986) ("Here it is obvious that in the preparation of its bid, which was accepted by the Government, Marden did not rely on an interpretation that composition or latex flooring was unnecessary in the mechanical rooms. Therefore, adherence to well established principles of contract law precludes the contractor's right to recover.").

[55] Finally, Vectrus submitted the unrebutted expert declaration of Mr. Christopher W. Foux, a consultant with LitCon Group, LLC.[27] ECF No. 39-1. A certified public accountant, Mr. Foux was tasked with calculating an "[MPC] adjustment to Vectrus's proposed cost that would result from the Government determining Vectrus's first business policy decision ..., which involved a change to the labor mix for [* * *] [FTEs], was inconsistent with the Solicitation's requirements." *Id.* ¶¶ 3, 5. Mr. Foux concluded "that the MPC adjustment to Vectrus's proposed cost would be $[* * *]. In other words, ... if the Government determined Vectrus should not have implemented this change to the labor mix, the Government's MPC of Vectrus's total evaluated cost would have been $[* * *], which is [still] $[* * *] less than VS2's total evaluated ***769** cost." *Id.* ¶ 7 (footnote omitted). The Court finds Mr. Foux's analysis and calculations credible, and thus concludes that VS2 has failed to carry its burden to demonstrate that – even assuming VS2 should not have been permitted to lower its projected via less expensive labor substitutions – the outcome of the cost ranking had a substantial chance of being different. *Id.* ¶ 9. While VS2 claimed that "the cost impact to Vectrus's proposal was $[* * *] [,]" the Court agrees with Mr. Foux that "[i]t is unclear how exactly VS2 calculated this" sum given that "VS2 did not include any supporting documentation or further explanation of how it computed $[* * *] figure, the assumptions it made, or the various elements it considered." *Id.* ¶ 11-12 (explaining that Vectrus itself erroneously claimed nearly $[* * *] in cost savings).

Given Mr. Foux's unopposed declaration, and the unrebutted analysis detailed therein, VS2 cannot demonstrate that it suffered prejudice either as a result of Vectrus's having proposed lower cost labor categories in lieu of those specified in the Solicitation or the government's acceptance of that approach. *Bannum*, 404 F.3d at 1358; *Info. Tech.*, 316 F.3d at 1319; *Alfa Laval*, 175 F.3d at 1367.

VIII. THE AGENCY REASONABLY EVALUATED VECTRUS's PAST PERFORMANCE IN COMPLIANCE WITH THE SOLICITATION

VS2 alleges that "Vectrus was undeserving of a 'Substantial Confidence' rating [for past performance] because it has adverse past performance on two prior task orders." Am. Compl. ¶ 61. VS2 thus asserts that "the Agency's decision to take corrective action by awarding to Vectrus was arbitrary and capricious because a reasonable evaluation of Vectrus's past performance would have kept Vectrus from being in line for award." *Id*.

In submitting information regarding the past performance factor, the Solicitation required each offeror to "identify all recent contracts where it ... experienced any performance problems that occurred within three years prior to the closing date of this RFP." AR 135 (RFP § L.5.3.5.1). For each contract identified, the Solicitation instructed the offeror to "provide copies of all Level III Corrective Action Reports (CARs), Cure Notices, Level III Nonconformance Reports (NCRs) or Show Cause letters received regardless of whether or not the contract was provided as a contract reference in the Offeror's task order proposals to date" and include further information, such as "the contract number, a brief description of the issue, the corrective actions taken to avoid recurrence of the problem, the extent to which the corrective action has been successful, a mitigation plan of how to prevent similar future issues, and [contacts to] confirm the success of the corrective measures." *Id*.

Concerning the government's evaluation of each offeror's past performance, the Solicitation provided that:

> The Government may consider the recency, relevancy, source and context of the past performance information it evaluates, as well as general trends in performance, and demonstrated corrective actions. A significant achievement, problem, problem resolution or lack of relevant data in any element can become an important consideration in the assessment process. An adverse finding in any element or a lack of relevant data in regards to a performance issue may result in an overall lower confidence assessment rating.

AR 148 (RFP § M.5.2.5). The Solicitation defined "recency" as "any contract under which any performance, delivery, or corrective action has occurred within the following time standards: three (3) years prior to this RFP closing date, regardless of the award date." AR 148 (RFP § M.5.2.7).

[56] **[57]** Our Court has explained that "[i]n the bid protest context, the assignment of a past performance rating is reviewed 'only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merits of the offerors' past performance is primarily a matter within the contracting agency's discretion.' " *Glenn Def. Marine (Asia), PTE Ltd. v. United States*, 105 Fed. Cl. 541, 564 (2012) (quoting *Todd Constr., L.P. v. United States*, 88 Fed.Cl. 235, 247 (2009)), *aff'd*, 720 F.3d 901 (Fed. Cir. 2013). Put differently, the Court affords great deference to an Agency's evaluation ***770** of an offeror's past performance. *Am. Auto Logistics, LP v. United States*, 117 Fed. Cl. 137, 185 (2014), *aff'd*, 599 F. App'x 958 (Fed. Cir. 2015); *see also Torres Advanced Enter. Sols., LLC v. United States*, 133 Fed. Cl. 496, 531 (2017) ("When a protestor challenges a procuring agency's evaluation of past performance, the court's review is limited to ensuring that the evaluation was reasonable and performed in accordance with the solicitation; in other words, the procuring agency's evaluation is entitled to great deference.").

[58] **[59]** In the instant case, Vectrus's proposal identified a Fort Bragg, North Carolina task order and included a Level III CAR, which – in compliance with the Solicitation's requirements concerning past performance – included information such as areas of concern, mitigating actions, and the current status/verification of effectiveness for resolving the identified issues. AR 2375-88. VS2 argues that the Agency failed to rationally consider Vectrus's " 'critical'

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" non-compliance recognized in Level III CAR, especially in light of the similarities between the PWS requirements in the Fort Bragg task order and the task order at issue here. Pl. MJAR at 40-42 (quoting AR 2380). While the Court concurs with VS2 that issues identified in the Level III CAR are real and severe, "the court is not empowered to substitute its judgment for that of the agency" where the Agency's conclusions find support in the record. *Navarro Rsch. & Eng'g, Inc. v. United States,* 151 Fed. Cl. 184, 192 (2020) (citations omitted). In assessing Vectrus's past performance, the Agency reasonably relied on three positive CPARS specifically related to the Fort Bragg task order: [28]

Contract: W52P1J-13-G-0027_0001	CPAR	CPAR	CPAR
Last Date of Assessment Period	6/29/2017	6/29/2018	6/29/2019
Quality	Very Good	Very Good	Very Good
Schedule	Very Good	Very Good	Very Good
Cost Control	Satisfactory	Very Good	Satisfactory
Management	Very Good	Very Good	Satisfactory
Utilization of Small Business	Exceptional	Exceptional	Exceptional
Regulatory Compliance	Very Good	Very Good	Satisfactory

AR 5446. Further, the assessing official concluded that "they would recommend Vectrus for similar requirements in the future." *Id*.

In the Agency's evaluation of Vectrus, the Agency further explained:

> Vectrus and subcontractor DA Defense has a significant amount of recent and relevant experience. Vectrus has and is successfully performing an EAGLE effort that is very comparable to this effort. DA Defense provided references in which they performed as successful subcontractor. Based on the overall performance record of the proposed team, the Government has a high expectation that the Offeror will successfully perform the required effort.

AR 5447. The Agency made this assessment while in possession of the Level III CARS ***771** Vectrus provided and after considering the positive CPARS from that very same task order. The record thus belies VS2's assertion that "[t]he Army did not consider, let alone analyze, the performance problems reported in the Level III CAR[.]" Pl. MJAR at 41. Consequently, the Court concludes that the Agency's assessment of Vectrus's past performance was reasonable.

IX. INJUNCTIVE RELIEF

[60] The Tucker Act vests this Court with authority to award "any relief that the court considers proper, including ... injunctive relief." 28 U.S.C. § 1491(b)(2); *see* RCFC 65. In evaluating whether permanent injunctive relief is warranted in a particular case, the Court must consider: (1) whether the plaintiff has succeeded on the merits; (2) whether the plaintiff has shown irreparable harm without the issuance of the injunction; (3) whether the balance of the harms favors the award of injunctive relief; and (4) whether the injunction serves the public interest. *PGBA, LLC v. United States*, 389 F.3d 1219, 1228–29 (Fed. Cir. 2004). As discussed *supra*, VS2 has succeed on the merits of its claim that the Army improperly switched the contract award from VS2 to Vectrus based on a GAO decision that is erroneous as a matter of law.

[61] **[62]** **[63]** Under the second factor, "a party seeking a permanent injunction must demonstrate that it will suffer irreparable harm without the desired relief." *Turner*

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Const. v. U.S., 94 Fed. Cl. 561, 585 (2010). Our Court " 'has repeatedly held that the loss of potential profits from a government contract constitutes irreparable harm.' " *WaveLink, Inc. v. United States*, No. 20-749C, 154 Fed. Cl. 245, 288 (June 24, 2021) (quoting *BINL, Inc. v. United States*, 106 Fed. Cl. 26, 49 (2012)); *see also Akal Sec., Inc. v. United States*, 87 Fed. Cl. 311, 319 (2009) ("[I]f a litigant has no action against the United States for lost profits, as is the case here, the harm to the litigant can be considered irreparable."). Here, VS2 will suffer such irreparable harm should the Army's new award to Vectrus be permitted to proceed at this juncture. Although this Court on occasion has noted that economic harm, "without more, does not seem to rise to the level of irreparable injury," *Minor Metals, Inc. v. United States*, 38 Fed. Cl. 379, 381-82 (1997) (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983)), here there is more than simply economic harm – VS2 would have retained its original award, along with the attendant benefits of experience and a future past performance reference, but for the Army's implementation of an irrational GAO recommendation. VS2 will thus suffer irreparable harm in the absence of an injunction.

[64] In balancing the harms, the Court notes that the government does not assert it will be harmed by an injunction, but rather focused only on the merits of VS2's claims. Def. MJAR at 33 ("[A]s explained above, VS2 cannot establish that either GAO or the Army acted irrationally or unlawfully. Therefore, there is no reason for the Court to intervene in the procurement process."); *see also* Oral Arg. Tr. 94:16-19 (government agreeing that "since you don't know what they would have done" in the absence of the MPC adjustment, "if you want the agency to make that assessment again, they will certainly do so"). Given that the parties informed the Court at the start of this case that the Agency intended to issue a bridge contract through September 10, 2021, there is nothing in the record indicating that the Agency would have to halt or somehow unwind any current contract performance should an injunction be issued, nor is there any evidence that the Agency would be harmed by reconsidering the implications of a risk assessment it has already performed. *See, e.g.*, Oral Arg. Tr. 42:19-24. The Court concludes that the balance of hardships favors VS2.

[65] **[66]** Finally, the public interest favors granting an injunction because "[t]here is an overriding public interest in preserving the integrity of the procurement process by requiring the government to follow its procurement regulations." *Hospital Klean of Tex., Inc. v. United States*, 65 Fed. Cl. 618, 624 (2005); *see also CW Gov't Travel, Inc. v. United States*, 110 Fed. Cl. 462, 496 (2013) (" 'The public interest in honest, open, and fair competition in the procurement process is compromised whenever an agency abuses its discretion.' " (quoting ***772** *PGBA, LLC v. U.S.*, 57 Fed. Cl. 655, 663 (2003))). The record demonstrates that the Agency's decision to cancel VS2's award and instead award the contract to Vectrus was based on an irrational GAO recommendation, which taints the procurement process. That is particularly true where, as here, the Solicitation itself required the Agency to consider performance risk due to the cost caps as part of the Agency's cost realism analysis. Thus, the Court concludes that the fourth factor favors VS2, as well.

Accordingly, the Court will issue a permanent injunction.

CONCLUSION

For the above reasons, the Court: **GRANTS** VS2's motion for judgment on the administrative record; **DENIES** the government's motion for judgment on the administrative record; and **DENIES** Vectrus's motion for judgment on the administrative record. The Clerk shall enter **JUDGMENT** for Plaintiff, VS2.

Given the Court's findings on the injunctive relief factors, the Agency is further directed as follows:

1. The Court permanently enjoins the *current* contract award to Vectrus.

2. The Agency must reconsider its contract award decision, taking into account not only the corrected cost evaluation, after removing the upward MPC adjustment, but also the Agency's prior risk assessment performed as part of its cost realism analysis (as well as any related findings in the technical evaluation, if warranted), as detailed in this Opinion and Order, *supra*. *See, e.g.*, AR 149 (RFP § M.5.3.2.1). In so doing, the Agency must consider the magnitude of the quantitative MPC adjustment as a measure of performance risk, even though the sum itself cannot be added to Vectrus's evaluated cost.

3. Relatedly, the Agency also must reconsider its responsibility determination, specifically with regard to

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the fact that Vectrus might incur a substantial loss if it were awarded the contract at issue.

4. In issuing this equitable relief, the Court does not reverse the Agency's award decision, but rather gives due regard to the Agency's discretion in the first instance. The Court thus neither orders the contract to be awarded to VS2 nor precludes the Agency from issuing a new contract award to Vectrus.

IT IS SO ORDERED.

All Citations

155 Fed.Cl. 738

Footnotes

1 On September 1, 2021, the Court filed, under seal, this opinion and order and provided the parties the opportunity to propose redactions. On September 9, 2021, the parties filed joint proposed redactions, ECF No. 45, which this Court adopts, in part, and accordingly reissues this public version of this opinion and order.

2 This background section constitutes the Court's findings of fact drawn from the administrative record. *See infra* Section IV. Other findings of fact are contained in the discussion sections of this opinion. *See infra* Sections V-VIII. Citations to the administrative record (ECF No. 24, as completed and amended by ECF Nos. 32, 36) are denoted as "AR."

3 "PWS" stands for performance work statement.

4 "CBA" refers to a collective bargaining agreement, and "SCA" refers to the Service Contract Act. *See* 41 U.S.C. §§ 6701, *et seq*. Pursuant to the SCA, contractors may be required to pay employees pursuant to a CBA. 41 U.S.C. § 6703.

5 Vanquish also filed a protest at GAO, which GAO dismissed on the grounds that Vanquish was not an interested party. AR 6382, 6385.

6 Following GAO's decision, the Army was faced with two options:

> COA 1: Accept GAOs recommendation. Take corrective action by T4Cing VS2 Task Order and issue the task order to Vectrus as the apparent low- cost/price acceptable offeror with a substantial confidence rating for past performance, if otherwise proper.
>
> COA 2: Not accept/disregard GAO's recommendation. Proceed with award to VS2 which would require: 1. a reasonable rationale as to why the GAO got its decision wrong, or 2. compelling reasons. To move forward with this approach, the Sec Army must approve, with AMC Concurrence.

AR 6393. "T4Cing" presumably refers to the issuance of a termination for convenience.

7 *Moore's Cafeteria Servs. v. United States*, 314 F. App'x 277, 279 (Fed. Cir. 2008) ("[W]e agree with the trial court that [plaintiff] waived the ability to challenge the terms of the solicitation by failing to object prior to the close of bidding."); *Burney v. United States*, 499 F. App'x 32, 34 (Fed. Cir. 2012) ("But if the solicitation or Amendment 1 was flawed, then Burney was required to object before the award."); *Bannum, Inc. v. United States*, 779 F.3d 1376, 1380 (Fed. Cir. 2015) ("A bidder that challenges the terms of a solicitation in the Court of Federal Claims generally must demonstrate that it objected to those terms 'prior to the close of the bidding process.' If it cannot do so, the bidder 'waives its ability to raise the same objection afterwards in a § 1491(b) action.' " (quoting *Blue & Gold*, 492 F.3d at 1315)); *Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1313 (Fed. Cir. 2016) ("A patent defect triggers the obligation to challenge the solicitation language and failure to do so generally constitutes waiver."); *Eskridge & Assocs. v. United States*, 955 F.3d 1339, 1345 n.5 (Fed. Cir. 2020) ("To the extent that Eskridge is protesting the terms of the 2018 Solicitation, such a challenge is untimely."); *Land Shark Shredding, LLC v. United States*, 842 F. App'x 589, 593 (Fed. Cir.

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2021) (citing *Blue & Gold*, 492 F.3d at 1313, in support of holding that plaintiff-appellant "has forfeited any challenge to the application of FAR 13.106-3 to this solicitation by not raising it while the procurement was pending").

8 *See ATSC Aviation, LLC v. United States*, 141 Fed. Cl. 670, 693 (2019) (addressing the government's argument "that *COMINT Systems Corp. v. United States*, 700 F.3d 1377 (Fed. Cir. 2012), expanded the judicially-created [*Blue & Gold*] waiver rule").

9 *Inserso*, 961 F.3d at 1349 n.1 (explaining that *Blue & Gold* "establishes a 'waiver rule' under a specific statutory authorization—the congressional command that bid-protest jurisdiction under 28 U.S.C. § 1491(b) be exercised with 'due regard to the ... need for expeditious resolution of the action' " (quoting 28 U.S.C. § 1491(b)(3))); *Bannum*, 779 F.3d at 1380 ("Our waiver rule implements Congress's directive in the Administrative Dispute Resolution Act (ADRA) of 1996, Pub. L. No. 104–320, § 12, 110 Stat. 3870, 3874, that courts 'shall give due regard to ... the need for expeditious resolution' of protest claims." (quoting 28 U.S.C. § 1491(b)(3))); *SEKRI, Inc. v. United States*, 152 Fed. Cl. 742, 753 (2021) (noting that "the majority in *Inserso* firmly grounded *Blue & Gold Fleet*'s waiver rule in the statutory text of 28 U.S.C. § 1491(b)(3)").

10 *See, e.g.*, Def. Resp. at 2-4 (discussing, among other decisions, *Sonoran Tech. & Pro. Servs., LLC v. United States*, 135 Fed. Cl. 28, 35 (2017)).

11 *See Inserso*, 961 F.3d at 1355 (Reyna, J., dissenting) ("When both provisions are read in harmony, the 'due regard' provision refers to the [Court of Federal Claims'] need to consider expeditious resolution of bid protests when deciding the proper relief."). The Court thus agrees with Judge Hertling's proposed approach to reconciling *Blue & Gold*, the statutory basis for its waiver rule, and Judge Reyna's dissent in *Inserso*:

> Given the waiver rule's statutory underpinning (28 U.S.C. § 1491(b)(3)) and the six-year statute of limitations of 28 U.S.C. § 2501, the waiver rule may support a different outcome if the protestor seeks bid preparation costs. *See Inserso*, 961 F.3d at 1352-56 (Reyna, J., dissenting) (raising objections to the *Blue & Gold Fleet* waiver rule). Because protesters are primarily interested in securing the contract award, the cases have focused on claims for injunctive relief. The distinction between the type of relief sought in the application of *Blue & Gold Fleet* appears to remain unexplored territory. One possible course through which the Federal Circuit will resolve the various strands of precedent, including its labeling of the waiver rule in *Inserso*, 961 F.3d at 1352, as a limitation on relief, and wrestle with the substance of Judge Reyna's dissent would be to hold that waiver under *Blue & Gold Fleet* ultimately does not compel dismissal, under either RCFC 12(b)(1) or (b)(6). Instead, the Federal Circuit could determine that the waiver rule forecloses a court's ability to grant injunctive relief. That approach, which seems most consistent with the language of § 1491(b)(3) on which the waiver rule is based, would leave open the possibility that plaintiffs could still obtain bid preparation costs, even in the face of a *Blue & Gold Fleet* waiver. In any event, the Federal Circuit has not yet even started down this path....

SEKRI ,152 Fed. Cl. at 753 n.5; *cf. DGR Assocs., Inc. v. United States*, 690 F.3d 1335, 1343 (Fed. Cir. 2012) (*Blue & Gold* waiver rule is not jurisdictional).

12 *DGR Assocs.*, 690 F.3d at 1343 ("In *Blue & Gold Fleet* the point made is straight-forward—if there is a patent, *i.e.*, clear, error in a solicitation known to the bidder, the bidder cannot lie in the weeds hoping to get the contract, and then if it does not, blindside the agency about the error in a court suit.").

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13 *See also* Oral Arg. Tr. 89:13-25 (suggesting application of GAO's ten day rule); *but see id.* at 40:3-5 (government counsel acknowledging "that this Court has not adopted GAO's specific 10-day rule").

14 In the interest of complete candor, this Court agrees with Judge Reyna's dissent in *Inserso* at least insofar as applied to the government's argument in favor of yet further expansion of the *Blue and Gold* waiver rule. *See ATSC Aviation*, 141 Fed. Cl. at 695 ("The waiver rule generally operates against challenges to the solicitation, against which ATSC makes no challenge. The Federal Circuit has never addressed the applicability of the waiver rule outside the context of a protest to a solicitation.").

15 According to at least one commentator, GAO's timeliness decision in this case raises yet further difficulties. E. Ransom & R. Sneckenberg, *FEATURE COMMENT: Speak Now Or Forever Hold Your Protest: Intervenor's Silence Waives Future Protest Grounds*, 63 No. 15 Government Contractor ¶ 107 (Apr. 14, 2021) ("Does this mean an awardee must, while defending its award, preemptively challenge every negative finding about its own proposal—e.g., every weakness, every negative comment about its past performance, every arguably too-low adjectival rating—as well as assert every possible additional weakness or negative comment that the protester's proposal may have warranted? One would hope not, as doing so could needlessly complicate protests and result in a significant waste of resources on protective challenges never intended to be litigated.... *VS2* does not seem to go so far, as it emphasized the unique evaluation scheme and the threshold standing and jurisdictional issues that could have been raised. Going forward, however, these waiver issues are considerations that counsel for intervenors will have to make[.]").

16 Put differently, "cost realism analysis is ... used as a means of determining the probable cost of performance of the work proposed by offerors and *this probable cost* is being used as the evaluation factor in making the source selection decision." R. Nash & J. Cibinic, *Cost Realism Analysis in Cost Reimbursement Contracts: What are the Rules of the Game?*, 5 No. 7 Nash & Cibinic Rep. ¶ 40 (July 1991) (emphasis in original).

17 " 'Interpretation of [a bid] solicitation is a question of law' that is reviewed de novo." *Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1309 (Fed. Cir. 2016) (quoting *Banknote*, 365 F.3d at 1353).

18 *Vitro Corp.*, B- 247734, 92-2 CPD ¶ 202, 1992 WL 251700, *5 (Sept. 24, 1992) ("a cap, by definition, converts at least some portion of a cost-type contract to a fixed-price contract"); *Halifax Tech. Servs., Inc.*, B-246236, 94-1 CPD ¶ 30, 1994 WL 20801, *7 (Jan. 24, 1994) ("[S]ince the effect of a cap like the one here is to convert a portion of this cost-type contract to a fixed-price contract, ... we agree that [a cost] cap may be analogous to a below-cost bid or offer in a fixed-price environment.").

19 V. Edwards, *Price Realism: A Primer*, 28 Nash & Cibinic Rep. NL ¶ 1 (Jan. 2014) ("Note that FAR does not use the term *price realism*, but that in common usage a cost realism analysis performed in a fixed-price acquisition is called a *price* realism analysis.... In short, cost realism analysis is done in cost-reimbursement acquisitions to determine whether a proposed estimated cost is unrealistically low and, if so, what it really should be. Price realism analysis is done in fixed-price acquisitions to determine whether a price is unrealistically low and to what degree, and to figure out why it is low so that risk can be properly assessed."). Thus, for example, and by way of analogy, the FAR generally discourages the use of uncompensated overtime and provides that contracting officers:

> [M]ust ensure that the use of uncompensated overtime in contracts to acquire services on the basis of the number of hours provided will not degrade the level of technical expertise required to fulfill the Government's requirements (see 15.305 for competitive negotiations and 15.404–1(d) for cost realism analysis). When acquiring these services, contracting officers must conduct a risk assessment and evaluate, for award on that basis, any proposals received that reflect factors such as: (1) Unrealistically low labor rates or other costs that may result in quality or service shortfalls[.]

FAR 37.115-2.

20 To avoid an upward MPC adjustment for Vectrus's subcontractors, Vectrus instructed them "to remove its proposed labor rate discounts and instead fully price" FTEs "by pricing each FTE in accordance with the applicable CBA and the pricing guidance in the solicitation." AR 4411; *see also* 4408 (noting that "the total

amount proposed by DA Defense has increased from a fiveyear total of $[* * *] to $[* * *]" and asserting that "this resolves this EN and precludes an MPC adjustment by the Government").

21 There were two upward cost adjustments to Vectrus's proposal for a total amount of $19,719,898. AR 6385 ("The principal upward adjustment was in the amount of $17,839,964 ... to account for certain costs that Vectrus had proposed to absorb ... during the primary base and option periods of performance" while "[a] second, smaller, upward adjustment was made in the amount of $1,879,933 ... to account for the same costs, but was allocable to a 6-month optional extension to the period of performance[.]").

22 Vectrus's counsel, at oral argument, posited that the salient provision in *MCT JV* is distinguishable because it "was stated in all caps and it was [thus] very explicit." Oral Arg. Tr. 86:13-16. The Court will not apply a different rule depending upon whether or not applicable solicitation language is written in a certain font or style.

23 " '[A] lawyer's statements may constitute a binding admission of a party[ ]' if the statements are 'deliberate, clear, and unambiguous[.]' " *Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 347 (4th Cir. 2014) (quoting *Fraternal Order of Police Lodge No. 89 v. Prince George's Cty., Md.*, 608 F.3d 183, 190 (4th Cir. 2010)); *see* *Checo v. Shinseki*, 748 F.3d 1373, 1378 n.5 (Fed. Cir. 2014) (questioning the Veterans Court's "reluctance to accept [a] concession" made at oral argument and citing case law for the proposition that admissions are generally binding on the parties); *see also* *Chemehuevi Indian Tribe v. United States*, 150 Fed. Cl. 181, 204 (2020).

24 Oral Arg. Tr. 31:4-14 (government counsel agreeing with the Court that "there is evidence in the record that the government believed it was a performance risk to not hire the [* * *] FTE, or maybe because of the fact that there is no requirement, per se, to hire the [* * *] ... because the government doesn't dictate the way the plaintiff performs the contract, the concern is that the way you get profitable is by cutting corners"); *see also id.* at 32:3-6 (government counsel agreeing that the cost realism analysis found that, "if the offeror does, in fact, plan on foregoing the hiring [of] [* * *] FTEs, ... that this could pose a risk to the government and the concern for post-award performance problems").

25 As particularly relevant in this case, then-Judge Wolski correctly explained:

> There is nothing about interpreting a solicitation that makes it a question of law only in the hands of the Federal Circuit. Indeed, in *Banknote Corp.*, ... the Federal Circuit explained that "judgment on the administrative record is often an appropriate vehicle" for our use—since protests "typically involve" such questions of law as "the correct interpretation of the solicitation issued," rather than disputes of material fact. *Banknote Corp.*, 365 F.3d at 1352. The Federal Circuit has described its " 'task' " of " 'address[ing] independently any legal issues, such as the correct interpretation of a solicitation,' " as part of its reapplication of the same APA standard used by our court in bid protests. *See* *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1329 (Fed. Cir. 2004) (quoting *Banknote Corp.*, 365 F.3d at 1353). The Court concludes that it has the duty to determine independently any questions of law, such as the correct interpretation of a solicitation, that must be addressed in bid protests.

CBY Design Builders, 105 Fed. Cl. at 342.

26 In ordering the Agency to revisit its responsibility determination, the Court agrees with the government that the Court should not "conduct its own determination of Vectrus's financial responsibility, an exercise within the purview of the agency, not the Court[.]" Def. Resp. at 7 & n.4. Moreover, although the lack of documentation in support of a responsibility determination ordinarily is not fatal to it, *see* Def. Resp. at 7 & n.4, Def. MJAR at 20-22, Def. Int. Resp. at 14-15, the Court concludes that, given the specific facts of this case, the Agency must revisit its previous responsibility determination. In that regard, and notwithstanding the "wide discretion" afforded to a contracting officer's responsibility determination, *Impresa*, 238 F.3d at 1334–35 (quoting *John C. Grimberg Co. v. United States*, 185 F.3d 1297, 1303 (Fed. Cir. 1999)), pursuant to the APA standard of review, "[o]f course, a contracting officer's [decision] must be rational: the choice is committed

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to discretion, not whim." *DynCorp Int'l, LLC v. United States*, No. 2020-2041, 10 F.4th 1300, 1312 (Fed. Cir. Aug. 25, 2021).

27 VS2 neither moved to strike the expert's opinion nor otherwise opposed the Court's consideration of it. *See FirstLine Transportation Sec., Inc. v. United States*, 116 Fed. Cl. 324, 326–27 (2014) (permitting expert declaration "not [to] substitute [his] judgment for the agency's judgment" but rather where the testimony contained "calculations based on data already contained in the administrative record, so that the Court can better understand the record"); *see also* *Naval Sys., Inc. v. United States*, 153 Fed. Cl. 166, 181 (2021).

28 According to the Army's evaluation of Vectrus's past performance, "[f]or recent reference W52P1J-13-G-0027 0001 Vectrus performs services as the Prime Contractor on the EAGLE Fort Bragg, North Carolina Task Order that includes Maintenance, Supply and Transportation services under a standardized EAGLE PWs." AR 5443.

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153 Fed.Cl. 602
United States Court of Federal Claims.

AMAZON WEB SERVICES, INC., Plaintiff,
v.
The UNITED STATES, Defendant,
and
Microsoft Corp., Intervenor-defendant.

No. 19-1796C
|
(E-filed: April 29, 2021) [1]

Synopsis

Background: Disappointed bidder filed post-award bid protest challenging Department of Defense's (DOD) award of joint enterprise defense infrastructure (JEDI) contract to upgrade and consolidate cloud computing infrastructure across DOD. Following intervention by awardee, as intervenor-defendant, government and intervenor moved to dismiss for failure to state claim.

[Holding:] The Court of Federal Claims, Patricia Elaine Campbell-Smith, J., held that waiver doctrine did not apply to bias claim.

Motions denied.

Procedural Posture(s): Review of Administrative Decision; Motion to Dismiss for Failure to State a Claim.

West Headnotes (6)

[1] **United States** Construction and presumptions as to pleadings

When considering a motion to dismiss for failure to state a claim, Court of Federal Claims must presume that the facts are as alleged in the complaint and make all reasonable inferences in favor of the plaintiff. RCFC, Rule 12(b)(6).

[2] **United States** Pleading

A complaint should be dismissed for failure to state a claim when the facts asserted by the claimant do not entitle him to a legal remedy. RCFC, Rule 12(b)(6).

[3] **United States** Pleading

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. RCFC, Rule 12(b)(6).

[4] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Under the waiver doctrine, a party that has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.

[5] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Waiver doctrine, providing that bid protestor that had opportunity to object to terms of solicitation containing patent error and failed to do so prior to close of bidding waived its ability to later raise same objection in bid protest action in Court of Federal Claims, did not apply to bar bid protestor's claims that Department of Defense's (DOD) execution of corrective action resulting in re-award of joint enterprise defense infrastructure (JEDI) contract to upgrade and consolidate cloud computing was product of bias, bad faith, improper influence, and/or conflicts of interest, since bidder was challenging execution of corrective action, not its terms, structure, or scope, and challenge could not be mounted before corrective action was executed.

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[6] **Public Contracts** Scope of review

United States Scope of review

When evaluating the credibility of plaintiff's claim requires the Court of Federal Claims to look beyond the factual allegations as presented in the amended complaint, such an analysis would contravene the standard the court is required to apply to a motion to dismiss the bid protest for failure to state a claim.

Attorneys and Law Firms

***603** Kevin P. Mullen, Washington, DC, for plaintiff. J. Alex Ward, Sandeep N. Nandivada, Caitlin A. Crujido, Alissandra D. Young, Andrew S. Tulumello, Daniel P. Chung, Theodore J. Boutrous, Jr., Richard J. Doren, and Eric D. Vandevelde, of counsel.

Anthony F. Schiavetti, Senior Trial Counsel, with whom appeared Jeffrey Bossert Clark, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Patricia M. McCarthy, Assistant Director, and Reta Bezak, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Michael G. Anderson and Benjamin M. Diliberto, Washington Headquarters Service & Pentagon Force Protection Agency; and Tyler J. Mullen, Defense Information Systems Agency, of counsel.

Robert S. Metzger, Washington, DC, for intervenor-defendant. Jeffrey M. Chiow, Neil H. O'Donnell, Lucas T. Hanback, Stephen L. Bacon, Deborah N. Rodin, Cassidy Kim, Eleanor M. Ross, Abid R. Qureshi, Roman Martinez, Anne W. Robinson, Dean W. Baxtresser, Genevieve Hoffman, Riley Keenan, and Margaret Upshaw, of counsel.

Bid-Protest; Motion to Dismiss; RCFC 12(b)(6).

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

On November 6, 2020, defendant and intervenor-defendant filed motions to dismiss plaintiff's amended complaint, in part. See ECF No. 237 (defendant's motion); ECF No. 238 (intervenor-defendant's motion). On November 20, 2020, plaintiff filed its response to both motions, ECF No. 239, and on December ***604** 1, 2020, defendant and intervenor-defendant filed replies in support of their motions, see ECF No. 240 (defendant's reply), ECF No. 241 (intervenor-defendant's reply). By leave of court, plaintiff filed a sur-reply to intervenor-defendant's reply on January 4, 2021, see ECF No. 256, and intervenor-defendant filed a sur-response on January 13, 2021, see ECF No. 258. The motions are ripe for ruling, and the court deems oral argument unnecessary. The court has considered all of the parties' arguments and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's and intervenor-defendant's motions are **DENIED**.

I. Background [2]

Plaintiff filed this case on November 22, 2019, to protest the United States Department of Defense's (DOD) decision to award the Joint Enterprise Defense Infrastructure (JEDI) contract to intervenor-defendant, under Solicitation No. HQ0034-18-R-0077 (solicitation). See ECF No. 1 at 1. On February 13, 2020, the court granted plaintiff's motion for a preliminary injunction, enjoining performance of the JEDI contract. See ECF No. 164 (opinion). On March 12, 2020, defendant filed a motion for voluntary remand to take corrective action, see ECF No. 177, which the court granted, see ECF No. 203. The DOD confirmed its award to intervenor-defendant on September 2, 2020. See ECF No. 221-1 at 15 (Source Selection Decision Document).

Following the conclusion of the remand proceedings and several updates to the administrative record, see ECF No. 227, ECF No. 235, plaintiff filed an amended complaint, see ECF No. 236. The amended complaint is very lengthy, at 175 pages, see id., but the motions to dismiss now before the court address only one count in the amended complaint. Both defendant and intervenor-defendant ask the court to dismiss the plaintiff's fourth count, which is titled "Bias, Bad Faith, Improper Influence, and/or Conflict of Interest." See id. at 169; see also ECF No. 237 at 9-10; ECF No. 238 at 5-7.

According to plaintiff,

> [p]rior to the original award, President Trump repeatedly made clear to the highest echelons of [the DOD], including those directly responsible

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> for overseeing the JEDI award, his desire that [plaintiff] not receive the JEDI Contract. [The DOD's] reevaluations on remand reveal that [the DOD] continued to succumb to presidential pressure to steer the JEDI Contract away from [plaintiff], and that the re-award was the product of bias, bad faith, improper influence, and/or conflicts of interest.

ECF No. 236 at 170. The statements that plaintiff alleges improperly influenced the procurement are numerous and varied. See, e.g., id. at 33-39. The content of those statements, however, is not relevant to the issue now before the court, and thus, requires no further discussion at this time.

Defendant and intervenor-defendant move to dismiss the fourth count of plaintiff's complaint on the basis of waiver. Specifically, defendant argues that plaintiff waived its argument related to bias before the first award decision was issued by not challenging the procurement prior to award. See ECF No. 237 at 23-28. And both defendant and intervenor-defendant insist that, even assuming plaintiff did not waive the issue prior to the initial award, it waived the issue by failing to challenge the corrective action before the second award decision. See id. at 28-33; ECF No. 238 at 24-32.

II. Legal Standards

[1] **[2]** **[3]** When considering a motion to dismiss brought under Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under ***605** RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

III. Analysis

The parties make nuanced and wide-ranging arguments in the briefs now before the court. The fundamental question presented by both defendant and intervenor-defendant, however, is a straightforward one: does the waiver doctrine articulated by the United States Court of Appeals for the Federal Circuit in Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308 (Fed. Cir. 2007), and its progeny bar plaintiff's bias claims as stated in its amended complaint.[3] See ECF No. 237 at 8; ECF No. 238 at 7. The court finds that it does not.

A. The Court Declines to Extend the Blue & Gold Waiver Doctrine

[4] In Blue & Gold, the Circuit held that:

> [A] party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.

492 F.3d at 1313. According to defendant, the Federal Circuit extended this waiver doctrine beyond the confines of patent errors in the terms of a solicitation in COMINT Sys. Corp. v. United States, 700 F.3d 1377 (Fed. Cir. 2012) and Inserso Corp. v. United States, 961 F.3d 1343 (Fed. Cir. 2020). See ECF No. 237 at 16. In COMINT, the Circuit held that the plaintiff had waived its ability to challenge an amendment to the solicitation that was issued sufficiently in advance of the award decision to have given the plaintiff an opportunity to do so. See COMINT, 700 F.3d at 1383. The Circuit further held that "[t]he same policy underlying Blue & Gold supports its extension to all pre-award situations." Id. at 1382.

Defendant acknowledges that "both Blue & Gold Fleet and COMINT involved challenges to solicitation terms," in contrast to the case at bar, but argues that the Circuit "has made clear ... that when an interested party is aware of a basis to challenge the terms of a competition—even if that basis is not, strictly speaking, the terms of the solicitation—and has the opportunity to raise the challenge before award or the close of bidding, it must do so or waive its challenge." ECF No. 237 at 16. In support of this argument, defendant cites to Inserso, 961 F.3d at 1343. See id. The Circuit applied the Blue & Gold waiver doctrine in Inserso when it concluded that the plaintiff had waived its right to challenge the "disclosure of certain information" in the course of two related procurements. Inserso, 961 F.3d at 1348.

The procurement at issue in Inserso, which was for information technology services, had a unique structure. Id. at 1345-46. Specifically, after issuing one solicitation, the agency:

> divided the ... competition into two competitions. One competition would award a "suite" of contracts in a "full and open" competition; the other would award a suite of contracts to small businesses. ... Importantly, the solicitation expressly states that small businesses could compete in both competitions but could receive only one award.

Id. at 1346. The two competitions proceeded on different timelines, and the agency made awards and debriefed offerors in the full and open competition while it continued communicating with, and receiving revisions from, offerors in the small business competition for approximately seven additional months before accepting final proposal revisions. See id. at 1346-47.

***606** After the agency made an award decision in the small business competition, the plaintiff, a disappointed bidder, filed a bid protest in this court challenging the small business award on the basis that the agency's debriefing after the award decision for the full and open competition "gave certain offerors in the small-business competition a competitive advantage by providing them, but not other bidders, the total evaluated price for all full-and-open awardees and previously undisclosed information regarding DISA's evaluation methodology." Id. at 1347. According to plaintiff, "this unequal provision of information created an organizational conflict of interest, ... and, in addition, violated at least one regulation specifically addressed to disparate treatment of bidders." Id.

The Federal Circuit concluded that plaintiff had waived its opportunity to challenge the alleged unequal provision of information. See id. at 1350. The Circuit explained that, due to the structure of the competitions, the plaintiff "knew, or should have known, that [the agency] would disclose information to the bidders in the full-and-open competition at the time of, and shortly after, the notification of awards." Id. The Circuit noted that both the applicable regulations and the express terms of the solicitations, "made patent that the solicitation allowed, and that there was likely to occur, the unequal disclosure regarding prices" challenged by the plaintiff. Id.

Defendant admits that Inserso "was perhaps the first time that the Federal Circuit had occasion to apply the Blue & Gold Fleet rule to claims not expressly directed at solicitation terms," but argues that this court has done so in a number of cases. ECF No. 237 at 17; see also id. at 17-20 (citing Peraton, Inc. v. United States, 146 Fed. Cl. 94, 101-103 (2019); Jacobs Tech. Inc. v. United States, 131 Fed. Cl. 430 (2017); Synergy Sols., Inc. v. United States, 133 Fed. Cl. 716, 740 (2017); Jacobs Tech. Inc. v. United States, 100 Fed. Cl. 179, 182 n.4 (2011)). Defendant also claims that this court has applied the Blue & Gold waiver rule in the context of challenges to organizational conflicts of interest (OCIs), which it asserts is relevant here. See id. at 19-20 (citing CRAssociates, Inc. v. United States, 102 Fed. Cl. 698, 712 (2011), aff'd, 475 F. App'x 341 (Fed. Cir. 2012); Concourse Grp., LLC v. United States, 131 Fed. Cl. 26, 29-30 (2017); Commc'n Constr. Servs. v. United States, 116 Fed. Cl. 233, 263-64 (2014)).

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The court has carefully reviewed the Circuit's decisions and the persuasive authority presented by the parties, and concludes that none of the cited cases support the application of a requirement that a protestor challenge a biased award decision—based on allegations not directly related to the terms or structure of the solicitation itself—before that decision is rendered by the agency. See, e.g., Peraton, 146 Fed. Cl. at 103 (finding that plaintiff's bad faith claim raised in its initial complaint was moot following corrective action and that the claim was waived due to plaintiff's attempted procedural maneuver of "simultaneously [seeking] to supplement the complaint and stay proceedings" so that it knew whether it was the awardee before prosecuting its claim); Jacobs Tech., 131 Fed. Cl. at 447 (finding that plaintiff's challenge to "the scope of the [agency's] corrective action" was properly brought before the final award decision following corrective action was rendered); Synergy Sols., 133 Fed. Cl. at 739-40 (finding that the protestor had waived its right to challenge the agency's failure to reopen discussions regarding a significant weakness in its proposal when it failed to challenge the scope of subsequent corrective action); Jacobs Tech., 100 Fed. Cl. at 182-83 (finding that the protestor's challenge to the re-solicitation, including a claim related to an alleged OCI arising from the participation of a certain offeror, was ripe even though the agency had not yet made an award); CRAssociates, 102 Fed. Cl. at 712 (finding that a protestor waived its challenge to an OCI arising from the participation of an offeror that had partially performed on a related contract that was later set aside when the protestor failed to raise the OCI issue prior to the close of the bidding process); Concourse Grp., 131 Fed. Cl. at 30 (finding that the protestor had waived its OCI challenge because the protestor was on notice of the alleged OCI prior to the award decision and had "easy access to the knowledge upon which it" relied); and ***607** Commc'n Constr. Servs., 116 Fed. Cl. at 262-63 (finding that the protestor waived its OCI claim when it knew the allegedly-conflicted party was participating in the procurement, and reiterating the rule that "if there is a patent ambiguity or error in the solicitation, a plaintiff must seek redress in court prior to award").

Even if the court were convinced that a further extension of the Blue & Gold waiver doctrine was warranted based on the facts in this case, it is not empowered to stray from the confines of binding precedent.

B. The Blue and Gold Waiver Doctrine Does Not Apply Here

[5] In its amended complaint, plaintiff alleges as follows:

> After [DOD] resolved the initial improprieties in the implementation of its corrective action through the issuance of Amendment 0009, the scope and form of [DOD]'s corrective action with respect to Pricing Scenario 6 appeared designed to facilitate a fair and impartial corrective action on remand. [DOD], in effect, had a clean slate from which it could reevaluate proposals in accordance with the RFP and remove any semblance of bias, bad faith, or improper influence from the evaluation process. And, [plaintiff] and [intervenor-defendant] could finally compete on a level playing field with a common understanding of the Price Scenario 6 requirements. The debriefing materials and administrative record, however, reveal that the execution of [DOD]'s corrective action was anything but fair and impartial.

ECF No. 236 at 169-70. Thus, plaintiff is explicitly challenging the "execution" of the corrective action, not its terms, its structure, or its scope. Id. at 170. The court is unconvinced that a challenge to the execution of the corrective action could be mounted before the corrective action was, in fact, executed.

Defendant and intervenor-defendant contest plaintiff's claim that it seeks to challenge the agency's evaluation, and instead argue that plaintiff's true intention is to challenge the procurement process because plaintiff was aware of the alleged facts supporting its bias claim in advance of any award decisions. See, e.g., ECF No. 237 at 25; ECF No. 238 at 24-26. A fundamental disbelief that plaintiff expected the agency to conduct the corrective action in

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an unbiased, good faith manner underlies defendant's and intervenor-defendant's waiver arguments. See ECF No. 237 at 30 (questioning whether plaintiff was "truly concerned that [DOD] evaluators and source selection officials were biased"); ECF No. 238 at 31 (arguing that plaintiff "cannot salvage its untimely bias allegations by the self-serving contention that it only realized that bias had infected the procurement when [DOD] disclosed the outcome of the second evaluation"); ECF No. 240 at 16 (claiming that plaintiff "attempts to avoid the consequences of its waiver by painting its bias claims as challenges not to a competition tainted by bias, but rather to the manifestation of that bias in the remand evaluations and source selection decision"); ECF No. 241 at 14 (stating that plaintiff's "assertion that Count IV arises from the reevaluation is flatly contradicted by its own oft-repeated theory of the case—that [DOD's] source selection team was 'consciously or unconsciously' biased due to the President's 'public statements and explicit and implicit directives to senior [DOD] officials' that 'made known his unapologetic bias against [plaintiff] and Mr. Bezos and his fervent desire that [plaintiff] not be awarded the JEDI Contract"); ECF No. 258 at 6 (insisting that the court "need not accept [plaintiff's] implausible assertion that it believed the remand would proceed in good faith," because it is inconsistent with plaintiff's claim that the DOD's "entire source selection team was infected by systemic bias and improper influence"), 7 (characterizing plaintiff's stated belief that the corrective action would be conducted in good faith as "implausible and inconsistent with [plaintiff's] own statements"). In making these arguments, defendant and intervenor-defendant repeatedly rely on matters beyond the allegations in the amended complaint. See generally id.

[6] Because evaluating the credibility of plaintiff's claim requires the court to look beyond the factual allegations as presented in the amended complaint, such an analysis ***608** would contravene the standard the court is required to apply to the present motions to dismiss. See Cary, 552 F.3d at 1376 (stating that the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff") (citing Gould, 935 F.2d at 1274). Whether plaintiff can ultimately prevail on its bias claim is another matter entirely—the court makes no findings of fact or determination on the merits at this time.

Intervenor-defendant urges the court to consider two exceptions to the court's duty to accept the facts as alleged in the complaint as true. It first argues that " 'it is well-established that a court need not accept as true allegations contained in a complaint that are contradicted by matters on which the court may take judicial notice.' " ECF No. 258 at 12 (quoting Commonwealth Edison Co. v. United States, 46 Fed. Cl. 158, 160 n.3 (2000)). It also argues that the court is not required to "accept as true 'pleading allegations that are contradicted ... by other allegations.' " Id. (quoting 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1363 (3d ed. 2020)). According to intervenor-defendant, plaintiff's "claim that it believed [DOD] would cure its bias concerns is contradicted by its own allegations and its blog post." Id. at 13.

With regard to intervenor-defendant's argument that the court should take judicial notice of plaintiff's blog post, the court finds that, even assuming it may do so, the post does little to support intervenor-defendant's position. Plaintiff published the post to which intervenor-defendant refers, titled "JEDI: Why we will continue to protest this politically corrupted contract award," on September 4, 2020, two days after the agency announced the second award to Microsoft. See ECF No. 241-1 (blog post); ECF No. 221-1 at 15 (agency's second award to Microsoft, dated September 2, 2020). Intervenor-defendant insists that the post is evidence that plaintiff never believed the agency would conduct an unbiased corrective action. See ECF No. 241 at 7-8. Specifically, intervenor-defendant highlights plaintiff's statement in the post that it objected to the corrective action on the basis that it "was likely to result in another contract award based on politics and improper influence and not based on the relative strengths of the two offerings." ECF No. 241-1 at 2; see also ECF No. 241 at 7. This statement, however, was preceded by plaintiff's statement that "[t]aking corrective action should have provided the [DOD] an opportunity to address the numerous material evaluation errors outlined in our protest, ensure a fair and level playing field, and ultimately, expedite the conclusion of litigation," ECF No. 241-1 at 2, and was followed by a statement that plaintiff "strongly disagree[s] with the [DOD's] flawed evaluation," id. at 3 (emphasis added). Thus, considered in context, plaintiff's statements: (1) indicate that its disagreement is with the agency's evaluation, and (2) do not preclude plaintiff's belief that the agency would act in good faith, despite its initial, and admittedly serious, reservations.

Intervenor-defendant's second argument, that the court is not required to "accept as true 'pleading allegations that are contradicted ... by other allegations,' " is equally unavailing. ECF No. 258 at 12 (quoting 5C Charles Alan Wright &

Arthur R. Miller, Federal Practice and Procedure § 1363 (3d ed. 2020)). Intervenor-defendant argues that plaintiff's theory of the case has evolved over time in contradictory ways. See ECF No. 258 at 7-13. As a result, intervenor-defendant contends, the court is not obligated to credit the facts underlying those contradictions. See id. at 12. To support this argument, intervenor-defendant refers generally to "all of the reasons explained above" in its sur-response. Id. This imprecise style of argument makes it difficult for the court to identify exactly which of plaintiff's allegations intervenor-defendant believes are subject to this exception to the standard the court generally applies to a motion brought pursuant to RCFC 12(b)(6). Nevertheless, the court reviewed the section of intervenor-defendant's argument that preceded this statement and concludes that the contradictions to which intervenor-defendant refers are not between allegations, but rather are between allegations and argument. See id. at 7-13. As such, the court declines to apply the exception urged by intervenor-defendant.

***609** For the foregoing reasons, the court concludes that the Blue & Gold waiver doctrine does not bar the fourth count in plaintiff's complaint. This ruling is restricted to the contours of plaintiff's challenge to the execution of the corrective action, as alleged in the amended complaint. Should plaintiff's case diverge from the confines of the allegations in its amended complaint, defendant and intervenor-defendant may assert waiver arguments if they deem such arguments to be appropriate. Because both defendant's and intervenor-defendant's motions to dismiss rely entirely on the premise that plaintiff has waived its bias claim under Blue & Gold and its progeny, the motions are both denied.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss plaintiff's complaint, in part, ECF No. 237, is **DENIED**;

(2) Intervenor-defendant's motion to dismiss plaintiff's complaint, in part, ECF No. 238, is **DENIED**;

(3) On or before **May 28, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** proposing a plan for further proceedings in this case; and

(4) On or before **May 28, 2021,** the parties are directed to **CONFER** and **FILE** a **notice of filing** attaching a proposed redacted version of this opinion, with any competition-sensitive or otherwise protectable information blacked out.

IT IS SO ORDERED.

All Citations

153 Fed.Cl. 602

Footnotes

1 This opinion was filed under seal on April 28, 2021, in order to allow the parties an opportunity to propose appropriate redactions. See ECF No. 264. On April 29, 2021, the parties filed a notice in which they report that no redactions are required. See ECF No. 265. Accordingly, this public version of the opinion is identical to the sealed opinion with the exceptions of the filing date and the content of this footnote.

2 The case involves considerable detail, but for purposes of deciding these motions, the court will relate only those details that are necessary to the instant analysis.

3 Intervenor-defendant's arguments track closely with defendant's arguments. See ECF No. 238; ECF No. 241; ECF No. 258. Accordingly, the court will not separately discuss intervenor-defendant's arguments unless they are both pertinent to this decision and different from the arguments made by defendant.

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United States Code Annotated
Title 31. Money and Finance (Refs & Annos)
Subtitle III. Financial Management
Chapter 35. Accounting and Collection
Subchapter V. Procurement Protest System (Refs & Annos)

31 U.S.C.A. § 3551

§ 3551. Definitions

Effective: October 28, 2009
Currentness

In this subchapter:

(1) The term "protest" means a written objection by an interested party to any of the following:

(A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.

(B) The cancellation of such a solicitation or other request.

(C) An award or proposed award of such a contract.

(D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

(E) Conversion of a function that is being performed by Federal employees to private sector performance.

(2) The term "interested party"--

(A) with respect to a contract or a solicitation or other request for offers described in paragraph (1), means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract; and

(B) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 with respect to the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, includes--

(i) any official who is responsible for submitting the agency tender in such competition; and

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(ii) any one individual who, for the purpose of representing the Federal employees engaged in the performance of the activity or function for which the public-private competition is conducted in a protest under this subchapter that relates to such public-private competition, has been designated as the agent of the Federal employees by a majority of such employees.

(3) The term "Federal agency" has the meaning given such term by section 102 of title 40.

CREDIT(S)

(Added Pub.L. 98-369, Div. B, Title VII, § 2741(a), July 18, 1984, 98 Stat. 1199; amended Pub.L. 99-145, Title XIII, § 1304(d), Nov. 8, 1985, 99 Stat. 742; Pub.L. 103-272, § 4(f)(1)(K), July 5, 1994, 108 Stat. 1362; Pub.L. 103-355, Title I, § 1401, Oct. 13, 1994, 108 Stat. 3287; Pub.L. 104-106, Div. D, Title XLIII, § 4321(d)(1), Feb. 10, 1996, 110 Stat. 674; Pub.L. 107-217, § 3(h)(6), Aug. 21, 2002, 116 Stat. 1300; Pub.L. 108-375, Div. A, Title III, § 326(a), Oct. 28, 2004, 118 Stat. 1848; Pub.L. 110-161, Div. D, Title VII, § 739(c)(1)(A), Dec. 26, 2007, 121 Stat. 2030; Pub.L. 110-181, Div. A, Title III, § 326(a), Jan. 28, 2008, 122 Stat. 62; Pub.L. 111-84, Div. A, Title III, § 327(a), (b), Oct. 28, 2009, 123 Stat. 2255.)

Notes of Decisions (70)

31 U.S.C.A. § 3551, 31 USCA § 3551
Current through P.L. 117-57. Some statute sections may be more current, see credits for details.

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 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 91. United States Court of Federal Claims (Refs & Annos)

28 U.S.C.A. § 1491

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

Effective: December 31, 2011
Currentness

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) Both the Unites [1] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

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(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

(6) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 940; July 28, 1953, c. 253, § 7, 67 Stat. 226; Sept. 3, 1954, c. 1263, § 44(a), (b), 68 Stat. 1241; Pub.L. 91-350, § 1(b), July 23, 1970, 84 Stat. 449; Pub.L. 92-415, § 1, Aug. 29, 1972, 86 Stat. 652; Pub.L. 95-563, § 14(i), Nov. 1, 1978, 92 Stat. 2391; Pub.L. 96-417, Title V, § 509, Oct. 10, 1980, 94 Stat. 1743; Pub.L. 97-164, Title I, § 133(a), Apr. 2, 1982, 96 Stat. 39; Pub.L. 102-572, Title IX, §§ 902(a), 907(b)(1), Oct. 29, 1992, 106 Stat. 4516, 4519; Pub.L. 104-320, § 12(a), Oct. 19, 1996, 110 Stat. 3874; Pub.L. 110-161, Div. D, Title VII, § 739(c)(2), Dec. 26, 2007, 121 Stat. 2031; Pub.L. 110-181, Div. A, Title III, § 326(c), Jan. 28, 2008, 122 Stat. 63; Pub.L. 110-417, [Div. A], Title X, § 1061(d), Oct. 14, 2008, 122 Stat. 4613; Pub.L. 111-350, § 5(g)(7), Jan. 4, 2011, 124 Stat. 3848; Pub.L. 112-81, Div. A, Title VIII, § 861(a), Dec. 31, 2011, 125 Stat. 1521.)

Notes of Decisions (4141)

Footnotes

1 So in original.

28 U.S.C.A. § 1491, 28 USCA § 1491

Current through P.L. 117-57. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Agile-Bot II, LLC v. United States, Fed.Cl., September 4, 2021

5 F.4th 1361
United States Court of Appeals, Federal Circuit.

ASSET PROTECTION & SECURITY SERVICES, L.P., Plaintiff-Appellant
v.
UNITED STATES, Akima Global Services, LLC, Defendants-Appellees

2021-1008
|
Decided: July 19, 2021

Synopsis

Background: Unsuccessful bidder for contract with United States Immigration and Customs Enforcement (ICE) brought bid protest action against United States and successful bidder, challenging award to successful bidder. The Court of Federal Claims, Marian Blank Horn, Senior Judge, 150 Fed.Cl. 441, determined that unsuccessful bidder lacked standing to challenge award. Unsuccessful bidder appealed.

[Holding:] The Court of Appeals, Dyk, Circuit Judge, held that unsuccessful bidder's proposal was not responsive to solicitation.

Affirmed.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

West Headnotes (8)

[1] **Federal Courts** Standing

Court of Appeals reviews standing determinations de novo and any underlying factual findings for clear error.

[2] **United States** Standing

The Court of Federal Claims, while an Article I court, applies the same constitutional standing requirements enforced by other federal courts created under Article III. U.S. Const. art. 1; U.S. Const. art. 3, § 2, cl. 1.

[3] **Public Contracts** Parties; standing
United States Parties; standing

Plaintiff protesting award of government contract, in order to establish standing, must first show that it is an interested party, which requires plaintiff to show that it is an actual or prospective bidder and has a direct economic interest in the procurement or proposed procurement. 28 U.S.C.A. § 1491(b)(1).

1 Cases that cite this headnote

[4] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests
United States Rights and Remedies of Disappointed Bidders; Bid Protests

Plaintiff protesting award of government contract, after showing that it is an interested party, must show that it was prejudiced by significant error in procurement process, meaning that but for the error, it would have had a substantial chance of securing the contract, in order to establish standing. 28 U.S.C.A. § 1491(b)(1).

[5] **Public Contracts** Form and requisites; responsiveness
United States Form and requisites; responsiveness

Proposal of unsuccessful bidder for contract with United States Immigration and Customs Enforcement (ICE) was not responsive to solicitation, which made it ineligible for contract award, and thus unsuccessful bidder did not have substantial chance of winning contract and lacked standing to bring action against United States and successful bidder; unsuccessful bidder's bid contradicted material terms of solicitation, which had

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been amended to indicate government could not provide tax-exempt certificate, and while unsuccessful bidder essentially argued that error in referencing, in description of pricing, that it was expecting to receive certificate was harmless, compliance with amendments concerning certificate constituted material term of solicitation without which there would have been ambiguity in agreement terms. 28 U.S.C.A. § 1491(b)(1).

1 Cases that cite this headnote

[6] **Public Contracts** Form and requisites; responsiveness

United States Form and requisites; responsiveness

A government contract proposal that fails to conform to the material terms and conditions of a solicitation should be considered unacceptable and a contract award based on such an unacceptable proposal violates the procurement statutes and regulations.

1 Cases that cite this headnote

[7] **Public Contracts** Relief of contractors in general; misrepresentation and mistake

United States Relief of contractors in general; misrepresentation and mistake

In limited circumstances, if government has knowledge, or constructive knowledge, that contractor's bid is based on mistake, and government accepts bid and awards contract despite knowledge of this mistake, then trial court may reform or rescind contract; such relief may be appropriate to prevent the government from overreaching when it knows the contractor has made a significant mistake during the bidding process.

[8] **Public Contracts** Relief of contractors in general; misrepresentation and mistake

United States Relief of contractors in general; misrepresentation and mistake

Remedy of reformation or rescission of contract if government accepts contract bid, despite knowledge or constructive knowledge that bid is based on mistake, is not available for errant bid caused by bidder's gross negligence in failing to read and consider specifications thoroughly.

***1362** Appeal from the United States Court of Federal Claims in No. 1:20-cv-00449-MBH, Senior Judge Marian Blank Horn.

Attorneys and Law Firms

David Thomas Ralston, Jr., Foley & Lardner LLP, Washington, DC, argued for plaintiff-appellant. Also represented by Julia Di Vito, Frank S. Murray, George Ellsworth Quillin.

Daniel B. Volk, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by Brian Matthew Boynton, Robert Edward Kirschman, Jr., Douglas K. Mickle.

Che Peter Dungan, Miles & Stockbridge P.C., Washington, DC, argued for defendant-appellee Akima Global Services, LLC. Also represented by Roger V. Abbott; Alfred Wurglitz, Rockville, MD.

Before Dyk, Prost *, and Hughes, Circuit Judges.

* Circuit Judge Sharon Prost vacated the position of Chief Judge on May 21, 2021.

Opinion

Dyk, Circuit Judge.

The U.S. Immigration and Customs Enforcement (ICE) awarded a contract to Akima Global Services, LLC to provide services at one of ICE's detention facilities in Arizona. Asset Protection and Security Services, L.P., an unsuccessful bidder, brought a bid protest action in the Court of Federal Claims ("Claims Court"), challenging the award. The Claims Court held that Asset was without standing to challenge the award. We affirm.

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BACKGROUND

The pertinent facts are not in dispute. In 2016, ICE issued a solicitation for a contractor to provide detention, food, and transportation services at its Florence Detention Center in Arizona. Asset was the incumbent contractor. The solicitation went through various modifications and amendments and provided several evaluation ***1363** factors. Under the original solicitation, ICE indicated that proposals would "be evaluated for price realism, completeness, and reasonableness." J.A. 430.

While this version of the solicitation was pending, ICE received a question from a prospective offeror asking, "Arizona charges 4.5% 'business tax'; will the Federal Government issue a tax exemption certificate to the successful offeror?" *Id.* at 528. ICE responded, "Yes." *Id.* Given ICE's answer, Asset's initial proposal included an explanation of the cost estimates factored into its pricing, stating that "[s]ales taxes were not charged due to the government's expressed intent to provide Team Asset with a tax-exempt certificate, where applicable." *Id.* at 2022.

Ultimately, ICE selected Akima for the contract award because the government determined that it offered the best value. Asset filed a bid protest with the Government Accountability Office (GAO). Rather than proceed with the bid protest, ICE decided to take voluntary corrective action.

ICE then issued Amendment 17, which made several changes to the solicitation, and required offerors to supply ICE with specific pricing information in their proposals. Amendment 17 also changed the way that ICE was to analyze prospective offerors' pricing. Rather than evaluate proposals for price realism as well as reasonableness, ICE required offerors to submit a firm fixed price proposal and explained that it would "assess the reasonableness of the proposed prices" and "conduct its price analysis using one or more of the techniques specified in FAR 15.404-1(b)." *Id.* at 779. These techniques include the "[c]omparison of proposed prices received in response to the solicitation," 48 C.F.R. § 15.404-1(b)(2)(i), and the "[c]omparison of proposed prices to historical prices paid, whether by the Government or other than the Government, for the same or similar items," *id.* § 15.404-1(b)(2)(ii), among other techniques, *see id.* § 15.404-1(b)(2)(iii)–(vii) (outlining other price analysis techniques).[1] In other words, ICE would determine whether the prices were not unreasonably high (reasonable) but would not determine whether they were unreasonably low (price realism). Asset submitted its updated proposal on May 30, 2019.

[1] *See also* 48 C.F.R. § 15.404-1(b)(3) (explaining that "[t]he first two techniques at 15-404-1(b)(2) are the preferred techniques").

After discussions with offerors, ICE issued Solicitation Amendment 19 on May 31, 2019. In this Amendment, ICE corrected its earlier response to the tax-exempt status question. ICE clarified that it "CANNOT delegate its tax exempt status to contractors for the performance of government services." J.A. 1281. In light of this change, ICE instructed that offerors "review their price proposals and provide their best and final prices." *Id.*

Asset's Vice President for Contract Administration & Business Development, Ron Gates, responded to the Amendment the same day and stated that he had "reviewed, signed and attached Amendment 19 hereto. Asset's proposal does not require further revision." *Id.* at 1278. Asset did not remove the tax-exempt certificate language from its proposal despite receipt of this Amendment.

ICE again clarified the tax-exempt status question via Amendment 20, which issued on June 4, 2019, adding the word "no" to its response. *Id.* at 1285 ("*No*, the ***1364** Government CANNOT delegate its tax exempt status to contractors for the performance of government services." (emphasis added)). In the amendment, the government again instructed that offerors "review their price proposals and provide their best and final prices." *Id.*

Mr. Gates again responded to the Amendment on behalf of Asset, stating that "Asset has reviewed it [sic] price proposal in response to Amendment 20. No changes are deemed necessary. I have attached a signed copy of Amendment 20 herewith." *Id.* at 1282. The tax-exempt certificate language remained in Asset's proposal.

Thereafter, ICE again selected Akima for the contract award. Asset again filed a protest with the GAO, challenging ICE's evaluation of its proposal under the factors outlined in the solicitation and challenging ICE's best-value analysis. ICE again decided that it was best to take corrective action on its own by reevaluating the proposals and making a new source selection and requested that the GAO dismiss the protests, which the GAO did.

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On reevaluation, ICE once again selected Akima for the contract award. The government utilized FAR 15.404-1(b)(2)(i) in its price analysis, comparing the prices proposed by the bidders. ICE concluded that Asset was ineligible to receive the contract award because Asset's proposal included the tax-exempt certificate language, rendering it a contingent price. In response, Asset filed another bid protest at the GAO, arguing that ICE improperly concluded that its bid contained contingency pricing and again disputing ICE's best-value analysis. This bid protest went forward. The GAO agreed that ICE improperly determined that Asset's bid contained contingency pricing but concluded that Asset "was not prejudiced by the agency's error," finding ICE's best-value analysis "to be reasonable," J.A. 1469, and denying Asset's protest.

Asset then filed a bid protest complaint at the Claims Court. The government and Akima (the successful bidder) argued that Asset lacked standing to bring the bid protest. The Claims Court "determined that Asset's price proposal ... was non-responsive to the requirements of the Solicitation, as explicitly amended more than once, and, therefore, ... Asset's price proposal was non-compl[ia]nt," making it ineligible for the contract award. J.A. 35. Because Asset submitted a non-responsive bid, the Claims Court held that Asset "lack[ed] standing to bring the ... protest." *Id.* at 36.

Asset appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

[1] We review standing determinations de novo and any underlying factual findings for clear error. *CliniComp Int'l, Inc. v. United States*, 904 F.3d 1353, 1357 (Fed. Cir. 2018).

[2] The Claims Court, while an Article I court, "applies the same [constitutional] standing requirements enforced by other federal courts created under Article III." *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009) (quoting *Anderson v. United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003)). The standing issue in this case, however, is framed by 28 U.S.C. § 1491(b)(1), which provides the Claims Court's jurisdiction over bid protests. ***1365** [2] We have explained that § 1491(b)(1) "imposes more stringent standing requirements than Article III." *Weeks Marine*, 575 F.3d at 1359.

2 Section 1491(b)(1) grants the Claim's Court jurisdiction over

> an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or an alleged violation of statute or regulation in connection with a procurement of a proposed procurement.

28 U.S.C. § 1491(b)(1).

[3] Section 1491(b)(1) requires a protestor to make two showings to establish standing: "First, it must show that it is an 'interested party,' " which "requires the plaintiff to show that it is 'an actual or prospective bidder' and has a 'direct economic interest' in the procurement or proposed procurement." *CliniComp*, 904 F.3d at 1358 (quoting *Diaz v. United States*, 853 F.3d 1355, 1358 (Fed. Cir. 2017)).

[4] "Second, the plaintiff must show that it was prejudiced by a significant error in the procurement process," meaning that, "*but for the error*, it would have had a substantial chance of securing the contract." *CliniComp*, 904 F.3d at 1358 (emphasis in original) (first quoting *Diaz*, 853 F.3d at 1358; and then quoting *Labatt Food Serv., Inc. v. United States*, 577 F.3d 1375, 1378 (Fed. Cir. 2009)).

[5] We conclude that Asset did not have a substantial chance of winning the contract because its proposal was not responsive to the solicitation, making it ineligible for the contract award. Asset's bid included information that expressly contradicted the solicitation's material terms. Thus, Asset was without standing to challenge ICE's award of the contract to Akima.

Asset admits that its bid includes an error. ICE's solicitation required bidders to "[e]xplain in detail all pricing and estimating techniques." J.A. 779. Asset's description of its pricing, explaining that it was expecting the government to provide a tax-exempt certificate, was not consistent with the solicitation as amended. Asset essentially argues that this error was harmless. First, it argues that its bid price was unaffected by the error given that the solicitation, "through its firm fixed price requirement, established that an offeror's firm fixed price proposal made an offeror responsible for all costs of contract performance, irrespective of whether or not the offeror factored a specific cost into its calculation of its firm fixed price." Appellant's Br. 28. Asset points out that a firm fixed price contract places "maximum risk and full responsibility for all costs and resulting profit or

loss" on the offeror. *Id.* at 26 (quoting 48 C.F.R. § 16.202-1; then citing *ITT Fed. Servs. Corp. v. Widnall*, 132 F.3d 1448, 1451 (Fed. Cir. 1997)). Second, Asset contends that its bid did not set a contingent price. Third, Asset argues that the solicitation did not require a price-realism analysis. On appeal, the government does not appear to dispute any of these three points. Instead, it argues that "Asset's proposal was unacceptable on its face" and, as a result, could not have been selected and was ineligible for award of the contract. Appellee's Br. 9. Asset thus "lack[ed] standing to challenge the agency's decision to award the contract to Akima." *Id.*

[6] Under our cases, "a proposal that fails to conform to the material terms and conditions of [a] solicitation should be considered unacceptable and a contract award ***1366** based on such an unacceptable proposal violates the procurement statutes and regulations." *Allied Tech. Grp. v. United States*, 649 F.3d 1320, 1329 (Fed. Cir. 2011) (quoting *E.W. Bliss Co. v. United States*, 77 F.3d 445, 448 (Fed. Cir. 1996)). The government argues that compliance with the amendments relating to the unavailability of a tax-exempt certificate constituted a material term of the solicitation because, absent compliance, there would be a significant ambiguity in the terms of any purported agreement. We agree. Given the mismatch between the terms of ICE's solicitation and Asset's bid, any agreement formed would fail to "satisfy the requirement of reasonable certainty applicable to the essential terms of all contracts." *Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1355–56 (Fed. Cir. 2016); *see also United Pac. Ins. Co. v. Roche*, 401 F.3d 1362, 1366 (Fed. Cir. 2005) ("In the absence of ... sufficiently definite terms, no contractual obligations arise." (quoting *Modern Sys. Tech. Corp. v. United States*, 979 F.2d 200, 202 (Fed. Cir. 1992))).

[7] **[8]** This ambiguity was significant. If ICE had selected Asset's bid, that would have created a risk of future litigation on the theory that the government knew of the error in Asset's bid and did not require its correction. "[I]n limited circumstances," "if the government has knowledge, or constructive knowledge, that a contractor's bid is based on a mistake, and the government accepts the bid and awards the contract despite knowledge of this mistake, then a trial court may reform or rescind the contract." *Giesler v. United States*, 232 F.3d 864, 869 (Fed. Cir. 2000) (citing *United States v. Hamilton Enters., Inc.*, 711 F.2d 1038, 1046 (Fed. Cir. 1983)); *see also Hunt Constr. Grp. v. United States*, 281 F.3d 1369, 1376 (Fed. Cir. 2002) (explaining that, in certain circumstances, "[w]hen the government has notice of a mistake in a particular bid," "fairness and good faith dealing" prevents "the government from knowingly awarding a contract to a bidder whose bid contained a mistake of which the government was aware"). "Such relief may be appropriate to prevent the government from overreaching when it knows the contractor has made a significant mistake during the bidding process." *Giesler*, 232 F.3d at 869. The remedy, however, is not available for an "errant bid" caused by a bidder's "gross negligence in failing to read and consider the specifications thoroughly." *Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1157 (Fed. Cir. 1987).

Although such a claim of government liability in the circumstances of this case could not have succeeded because Asset could not plausibly claim that it misread the amended solicitation, the government has a substantial interest in not creating opportunities for litigation based on an erroneous bid and was not obligated to accept a bid that was contrary to the amended terms of its solicitation.

While ICE could have exercised its discretion to conduct another round of discussions with the prospective bidders to permit Asset to cure the error in its bid, ICE was under no obligation to do so. *See JWK Int'l Corp. v. United States*, 279 F.3d 985, 988 (Fed. Cir. 2002) ("[W]hether discussions should be conducted lies within the discretion of the contracting officer." (citing 48 C.F.R. § 15.306(d)(3))).

Thus, because of the error in Asset's bid, Asset was an ineligible bidder, did not have a substantial chance of winning the ICE contract, and was without standing to challenge ICE's award of the contract to Akima.

AFFIRMED

All Citations

5 F.4th 1361

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B- 418321.4 (Comp.Gen.), 2021 WL 322130

COMPTROLLER GENERAL

Matter of: Accenture Federal Services, LLC

January 29, 2021

***1** Amy Laderberg O'Sullivan, Esq., Anuj Vohra, Esq., Olivia L. Lynch, Esq., William B. O'Reilly, Esq., and Zachary H. Schroeder, Esq., Crowell & Moring LLP, for the protester.
Robyn A. Littman, Esq., and Lucy G. MacGabhann, Esq., Department of Health and Human Services, for the agency.

Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Procuring agency is responsible for defining its needs and determining the best methods for meeting its requirements, and this extends to matters involving the relevance of offerors' performance history.

2. Protester's assertion that the terms of a solicitation should be more restrictive fails to state a basis for protest.

3. Protester's speculation that the agency will evaluate proposals in an unreasonable manner is premature.

DECISION

Accenture Federal Services, LLC, of Arlington, Virginia, protests the provisions of task order request for proposals (TORP) No. 191606, issued by the Department of Health and Human Services, seeking services to support operation of the Center for Medicare and Medicaid Services' (CMS) federally facilitated exchange. (FFE).[1] Accenture, the incumbent contractor, challenges the solicitation provisions regarding evaluation of corporate experience.

We dismiss the protest.

BACKGROUND

In July 2019, pursuant to Federal Acquisition Regulation subpart 16.5, the agency issued the solicitation to firms holding indefinite-delivery indefinite-quantity contracts under CMS's Strategic Partner Acquisition Readiness program. The solicitation contemplates award of a task order for a one-year base period and four 1–year option periods, and provides that source selection will be based on a best-value tradeoff between the following evaluation factors: relevant corporate experience; technical demonstration; technical approach/understanding; staffing plan/key personnel; small business utilization; and cost/price. Protest exh. 5, TORP amend. 3 at 15–17.

The solicitation provides for a two-phase evaluation, with phase I limited to evaluation of corporate experience. More specifically, the solicitation provides that, in phase I, each offeror must provide information regarding its corporate experience, and states that such information will be evaluated to determine the extent of an offeror's experience performing contracts "of similar size, scope and complexity to [these] requirement[s]." *Id.* at 15. Following evaluation of corporate experience, the agency "will advise offerors to participate in Phase II ... or, based on the information submitted, that it is unlikely the offeror(s) is/are a viable competitor."[2] *Id.* at 1.

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On November 17, the agency amended the solicitation, [3] providing specific information regarding the type of experience the agency will consider to be similar, stating:

> ***2** A system is of similar size to the FFE if it requires a similar amount of work to build and operate. This includes the entire software development lifecycle, including post-launch operations and maintenance. As such, a system of similar size also has multiple complex components, including external interfaces. A system of similar size does not necessarily process a similar number of transactions or serve a similar number of users, since an automated system should have largely fixed operating costs (except, for example, things like hosting.)
>
> A system is of similar scope to the FFE if it contains similar functional components. Specifically, the FFE includes a public-facing eligibility application; interfaces and logic for verifications; multi-stage eligibility logic; notice generation; and interfaces to external entities that support the provision of benefits.
>
> A system is of similar complexity to the FFE if it contains multi-stage decision logic and multiple external interfaces, which are delivered in part through a public-facing interface with a required 24/7/365 uptime and ability to accommodate policy changes.

Protest exh. 5, TORP amend. 3 at 15–16.

The solicitation required submission of proposals by 2:00 pm on December 7, 2020. Shortly before that time, Accenture filed this protest with our Office. [4]

DISCUSSION

Accenture primarily challenges the amended solicitation's provision regarding assessing experience that is similar in size, focusing on the language stating that the agency may consider prior experience with another system to be similar in size even if it "does not necessarily process a similar number of transactions or serve a similar number of users." [5] Protest at 9–13. More specifically, Accenture asserts that the agency may not reasonably consider an offeror's operation of state-based health exchanges to be similar in size because "user and transaction volume[s]" of state-based exchanges are significantly lower than the volumes experienced and anticipated under the FFE. *Id.* Accordingly, Accenture asserts that the amended solicitation's provision regarding similarity of size is "unreasonable on its face," and further complains that the provision improperly "conflates" consideration of size with considerations of scope and complexity. [6] *Id.* at 9–14.

In responding to Accenture's protest, the agency notes that the solicitation's size provision does not limit the ability of Accenture-the incumbent contractor-to compete. Agency Request for Dismissal, Dec. 11, 2020, at 2–4. Accordingly, the agency maintains that Accenture does not qualify as an interested party to challenge this provision. Further, the agency responds that Accenture's complaints merely reflect its attempt to restrict competition and provide a greater advantage for Accenture's incumbency. *Id.* More specifically, the agency asserts that Accenture's protest merely reflects a desire to diminish the competitiveness of offerors whose experience is limited to operating state-based health insurance exchanges.

***3** As a general matter, a procuring agency is responsible for defining its needs and identifying the best method for accomplishing them, *see, e.g., Watershed Security, LLC*, B–417178.4, B–417178.6, July 11, 2019, 2020 CPD ¶3 at 4; this principle extends to consideration of an offeror's experience and past performance, and includes the agency's determinations regarding the relevance of an offeror's performance history. *Honeywell Tech. Solutions, Inc.*, B–407159.4, 2013 CPD ¶110 at 3-4; *MFM Lamey Group, LLC,* B–402377, Mar. 25, 2010, 2010 CPD ¶81 at 10. In this context, an agency may reasonably provide for an evaluation that fosters competition by increasing the viability of proposals being submitted by non-incumbent offerors. *See, e.g., New Mexico State Univ.*, B–409566, June 16, 2014, 2014 CPD ¶228 at 4.

In addition, a prospective offeror does not generally qualify as an interested party to protest the terms of a solicitation where the protester meets the challenged requirements and, accordingly, is not prejudiced by the allegedly defective solicitation provisions. *See, e.g., Government & Military Certification Sys., Inc.,* B–409420, Apr. 2, 2014, 2014 CPD ¶116 at 4; *Westinghouse Elec.*

Corp., B–224449, Oct. 27, 1986, 86–2 CPD ¶479 at 2. In this regard, the role of our Office in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met-not to protect a protester's interest in restricting competition. *See, e.g., Honeywell Tech. Solutions, Inc., supra.* Finally, a protester's speculation that a procuring agency will evaluate proposals in an unreasonable manner is premature and will not be considered by our Office. *See, e.g., DGC Int'l,* B–410364.2, Nov. 26, 2014. 2014 CPD ¶343 at 3.

Here, we view Accenture's complaints regarding the terms of the solicitation as assertions that the solicitation should be more restrictive of competition. As noted above, a procuring agency is responsible for defining its needs, and determining the best methods for meeting its requirements; this extends to matters involving the relevance of offerors' performance history; and an agency may reasonably provide for an evaluation that fosters competition by increasing the feasibility of proposals submitted by non-incumbent offerors. In this context, Accenture has not identified any procurement statute or regulation that establishes parameters for determining the relevance of an offeror's experience with which the agency has failed to comply. Additionally, it is not lost on this Office that, to the extent Accenture's protest repeatedly references and relies upon its unique experience performing the current FFE contract, its protest is attempting to limit the agency's meaningful consideration of offerors that appear to be no less experienced than Accenture was upon its award of the incumbent contract. In this context, we see no basis to question the manner in which the agency states it will evaluate experience.

***4** Further, there is no question that Accenture is capable of complying with the solicitation provision regarding size similarity; that is, Accenture is not prejudiced by this provision-other than the "prejudice" of potentially facing more meaningful competition. On this record, we do not view Accenture as qualifying as an interested party to challenge the provision. Finally, to the extent Accenture is speculating that the agency will subsequently apply the stated evaluation factors in an unreasonable manner, its protest is premature and not for our consideration.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

1 The FFE is a health insurance exchange, the public-facing component of which is known as "Healthcare.gov." The FFE is operated by CMS pursuant to the Patient Protection and Affordable Care Act, and allows individuals and small-business employers to compare and shop for private health insurance options.

2 Offerors that choose to continue will submit phase II technical and business proposals.

3 Accenture has filed two previous protests challenging the agency's prior evaluations and source selection decisions. Among other things, Accenture has complained that the agency's evaluation of corporate experience was contrary to the solicitation's stated evaluation factors in that Accenture's experience as the incumbent contractor "did not serve as a vast discriminator in [Accenture's] favor." Accenture Protest, June 22, 2020, at 3. Following the prior protests, the agency advised our Office that it would amend the solicitation, request and evaluate revised proposals, and make a new award determination. Protest exh. 2, Agency Letter to GAO, Sept. 22, 2020, at 1. The agency's November 17 solicitation amendment was part of its action following the prior protests.

4 Because the value of the task order is in excess of $10 million, this protest is within our jurisdiction to consider protests regarding civilian agency indefinite-delivery, indefinite-quantity task order contracts. *See* 41 U.S.C. § 4106(f)(1)(B); *Alliant Sols., LLC,* B–415994, B–415994.2, May 13, 2018, 2018 CPD ¶173 at 4 n.8.

5 As noted above, the solicitation provides that, in assessing similarity of size, the agency will consider whether the prior effort required "a similar amount of work to build and operate," including consideration of "the entire software

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development lifecycle," and/or requirements for "multiple complex components, including external interfaces." Protest exh. 5, TORP amend. 3 at 15.

6 Accenture also protests that the solicitation fails to reflect a "surge of new customers" that Accenture maintains will occur "due to the coronavirus pandemic." Protest at 14–17. In its December 7 filing, although Accenture designated the protest as protected on GAO's electronic protest docketing system (EPDS), it still redacted significant portions of this argument-precluding GAO's review of the redacted portions. On December 17, several days after the solicitation closing date, Accenture submitted the complete protest on EPDS, thereby disclosing to GAO, for the first time, all of its allegations regarding this issue. There is no dispute that all of the information submitted on December 17 was available to Accenture at the time it filed its December 7 protest. Our Bid Protest Regulations require a protester to timely set forth all of the known legal and factual grounds supporting its allegations; that is, piecemeal presentation of evidence or information is prohibited. 4 C.F.R. § 21.2(a)(2); *see XTec, Inc.,* B–418619 *et al.,* July 2, 2020, 2020 CPD ¶253 at 25; *Raytheon Blackbird Techs., Inc.,* B–417522, B–417522.2, July 11, 2019, 2019 CPD ¶254 at 4; *Ellwood Nat'l Forge Co.-Protests and Costs,* B–416582 *et al.,* Oct. 22, 2018, 2018 CPD ¶362 at 11. Here, Accenture's untimely submission on December 17 is not for our consideration.

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842 Fed.Appx. 589
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. Fed. Cir. Rule 32.1.
United States Court of Appeals, Federal Circuit.

LAND SHARK SHREDDING,
LLC, Plaintiff-Appellant
v.
UNITED STATES, Defendant-Appellee

2020-1231
|
Decided: January 11, 2021

Synopsis

Background: Bidder on service-disabled veteran-owned small business (SDVOSB) set-aside contract for document shredding services for the Department of Veterans Affairs (VA) filed pre-award bid protest challenging agency's cancellation of the solicitation. The Court of Federal Claims, Marian Blank Horn, Senior Judge, 145 Fed.Cl. 530, dismissed. Bidder appealed.

Holdings: The Court of Appeals, Hughes, Circuit Judge, held that:

[1] bidder had standing to protest agency's withdrawal of the solicitation, but

[2] VA was entitled to cancel solicitation, given that bids were over the budget agency had allocated for the project.

Affirmed.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

West Headnotes (2)

[1] **Public Contracts** Parties; standing
United States Parties; standing

Bidder on service-disabled veteran-owned small business (SDVOSB) set-aside contract for document shredding services for the Department of Veterans Affairs (VA) had a substantial chance of receiving the contract, as the lowest bidder, but for agency's alleged errors, and thus had standing to protest agency's withdrawal of the solicitation. 28 U.S.C.A. § 1491(b)(1).

1 Cases that cite this headnote

[2] **Public Contracts** Failure to enter into contract; cancellation of solicitation
United States Failure to enter into contract; cancellation of solicitation

Even if there were two responsive bidders on service-disabled veteran-owned small business (SDVOSB) set-aside contract for document shredding services for the Department of Veterans Affairs (VA), VA was entitled to cancel solicitation, given that bids were over budget VA had allocated for the project; nothing in Veterans Affairs Acquisition Regulations (VAAR) or "Rule of Two," under which VA contracting officer awarded contracts on the basis of competition restricted to certain small business concerns, required contracting officer to make award when no acceptable proposals were received. 38 U.S.C.A. § 8127(d); 48 C.F.R. 13.106-3.

1 Cases that cite this headnote

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00508-MBH, Senior Judge Marian Blank Horn.

Attorneys and Law Firms

Joseph Anthony Whitcomb, Whitcomb, Selinsky, PC, Denver, CO, argued for plaintiff-appellant. Also represented by Timothy Turner.

Sonia Marie Orfield, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by Jeffrey B. Clark, Steven John Gillingham, Robert Edward Kirschman, Jr.; Natica Chapman Neely, Office of General

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Counsel, United States Department of Veterans Affairs, Portland, OR.

Before Prost, Chief Judge, Reyna and Hughes, Circuit Judges.

Opinion

Hughes, Circuit Judge.

***590** The Department of Veterans Affairs withdrew a solicitation for bids that was set aside for service-disabled veteran-owned small businesses after determining that no qualifying businesses bid a price that was fair and reasonable. Land Shark, the lowest bidder on the solicitation, challenged the withdrawal of the solicitation. The Court of Federal Claims granted the government's motion to dismiss on the grounds that Land Shark lacked standing to challenge the withdrawal of the solicitation and that Land Shark failed to state a claim. Because we agree that Land Shark failed to state a claim, we affirm.

I

Land Shark Shredding, LLC is a service-disabled veteran-owned small business (SDVOSB) that bid unsuccessfully on a contract for document destruction services at White River Junction VA Medical Center and its associated clinics in Vermont and New Hampshire.

In December 2018, the VA issued the solicitation at issue on the Federal Business Opportunities (FBO) website as an SDVOSB set-aside. The decision to issue the solicitation as an SDVOSB set-aside was based on the contracting officer's determination under 38 U.S.C. § 8127(d), which requires that the VA provide certain preferences to veteran-owned small businesses in its award of contracts:

> [A] contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

In accordance with the threshold requirement, known as the "Rule of Two," the contracting officer conducted market research to determine whether there were two or more SDVOSBs that were likely to submit offers at fair and reasonable prices. Based on this research, the contracting officer concluded that "there are two SDVOSB vendors that may be able to provide the services," but that "[i]t is unknown if the prices would be fair and reasonable due to the location of the vendors." J.A. 47. The contracting officer therefore decided that "[a] solicitation will be posted on FBO as an SDVOSB set aside and a fair and reasonable determination will be made prior to award." *Id*. The contracting officer then issued the solicitation as an SDVOSB set-aside.

During the solicitation response period, a contractor asked: "Is it safe to assume if an offeror bids a per container price for this solicitation, that has been accepted as fair and reasonable per the [General Services Administration] GSA Schedule, and that the VA has recently awarded in other shredding contracts – that said price per container will be considered inherently fair and reasonable and therefore competitive?" J.A. 173. The contracting officer replied: "No, this is an open market solicitation; price reasonableness shall be in accordance with FAR 13.106-3." J.A. 179. This answer was made an amendment to the original solicitation. J.A. 178–79.

Two SDVOSBs bid on the solicitation. Land Shark's bid was the lower of the two quotes. J.A. 303. However, the contracting officer determined that neither of the two bids was fair and reasonable because both ***591** quotes were significantly higher than the incumbent company's pricing for these services, as well as the independent government cost estimate (IGCE). J.A. 343. Because the contracting officer determined that the quotes were not fair and reasonable, the contracting officer canceled the solicitation and notified the offerors that the solicitation would be reissued. J.A. 308–13.

Land Shark filed a protest with the VA, challenging the withdrawal of the solicitation. Land Shark argued that the IGCE was flawed for relying on the non-SDVOSB

incumbent's pricing and that it was unfair to compare Land Shark's pricing to that of the incumbent because the incumbent was not an SDVOSB. J.A. 316–19. Land Shark also argued that its GSA pricing had already been determined to be reasonable, and thus its current pricing was *per se* reasonable because it was lower than it's GSA pricing. *Id*. The contracting officer denied Land Shark's protest, and the VA reissued the solicitation as a small business set-aside rather than an SDVOSB set-aside. *Land Shark Shredding, LLC v. United States*, 145 Fed. Cl. 530, 543 (2019) (*Decision*).

In February 2019, Land Shark filed a bid protest with the Court of Federal Claims. Subsequently, the contracting officer withdrew her original decision on the agency level protest and canceled the second solicitation pending corrective action. J.A. 341. In March 2019, the contracting officer memorialized the corrective action taken, explaining that the IGCE was flawed and was no longer considered. J.A. 342–46. Nonetheless, the contracting officer found once again that Land Shark's pricing was not fair and reasonable because the quote was significantly higher than the historical pricing and exceeded the VA's available funding for the solicitation. *Id*.

Land Shark again challenged the cancellation of the solicitation in the Court of Federal Claims. The Court of Federal Claims granted the government's motion to dismiss, holding that Land Shark lacked standing to challenge the withdrawal of the solicitation, and that Land Shark failed to state a claim upon which relief could be granted.

II

"Whether a party has standing to sue is a question of law that we review *de novo*." *Rex Serv. Corp. v. United-States*, 448 F.3d 1305, 1307 (Fed. Cir. 2006). Similarly, "[t]he question of whether a complaint was properly dismissed for failure to state a claim upon which relief could be granted is one of law, which we review [without deference]." *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1170 (Fed. Cir. 1995). "In order to avoid dismissal for failure to state a claim, a complaint must allege facts plausibly suggesting (not merely consistent with) a showing of entitlement to relief." *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

III

The trial court concluded that Land Shark lacked standing to challenge the VA's cancellation of the solicitation because it was not an "interested party" under the Tucker Act. *Decision*, 145 Fed. Cl. at 553–54. The Tucker Act grants the Court of Federal Claims "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract.... " 28 U.S.C. § 1491(b)(1).

***592** "[T]o come within the Court of Federal Claims's § 1491(b)(1) bid protest jurisdiction, [the plaintiff] is required to establish that it (1) is an actual or prospective bidder and (2) possess[es] the requisite direct economic interest." *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009) (quoting *Rex Serv. Corp.*, 448 F.3d at 1308) (alteration in original). "[T]o prove a direct economic interest as a putative prospective bidder, [the bidder] is required to establish that it had a 'substantial chance' of receiving the contract." *Id*. (quoting *Rex Serv. Corp.*, 448 F.3d at 1308) (second alteration in original).

The government argues that Land Shark did not have a substantial chance of winning the contract award because Land Shark's bid exceeded the VA's designated funding for the solicitation, and because an award to Land Shark would have violated the Anti-Deficiency Act provision disallowing contracting officers from authorizing expenditures that exceed appropriated amounts. *See* 31 U.S.C. § 1341(a)(1)(A).

To counter, Land Shark argues that it had a substantial chance of winning the contract based on the Rule of Two. Because this contract was issued as an SDVOSB set-aside, and because Land Shark was the lowest bidder, Land Shark argues that the government was required to award the contract to Land Shark.

[1] Simply exceeding the agency's target allocation does not deprive a party of the requisite direct economic interest as a matter of law. *See Land Shark Shredding, LLC v. United States*, No. 20-1230, 842 Fed.Appx. 594 (Fed. Cir. 2021) ("We decline to establish a bright line rule that a bid in excess of an agency's targeted allocation *per se* fails the direct economic interest prong of § 1491(b)(1) bid protest jurisdiction"). Because Land Shark had a substantial chance of receiving the contract as the lowest bidder on the SDVOSB set-aside solicitation but for alleged errors, we conclude that

Land Shark had standing to protest the withdrawal of the solicitation and proceed to the merits.

IV

On the merits, Land Shark argues that (1) the contracting officer should have awarded the contract to Land Shark based on 38 U.S.C. § 8127(d) regardless of the reasonableness of its bid and (2) the contracting officer did not properly analyze the bids received for price reasonableness. We agree with the trial court that Land Shark failed to state a claim upon which relief could be granted. *Decision*, 145 Fed. Cl. at 563.

[2] Land Shark's first argument is based on the premise that, the requirements of 38 U.S.C. § 8127(d) were triggered here —i.e., the contracting officer had a reasonable expectation that two or more veteran-owned concerns would bid and that an award could be made at a fair and reasonable price—and that, once the Rule of Two is triggered, the government is required to award the contract, regardless of the actual reasonableness of the bids themselves. We note that this premise is far from established. It is unclear that the requirements of 38 U.S.C. § 8127(d) were met here so as to invoke the Rule of Two, given the contracting officer's explicit determination that "[i]t is unknown if the prices would be fair and reasonable." J.A. 47. We also have previously held that the VA can cancel SDVOSB set-aside solicitations where there are no reasonable bids, which would be impossible if Land Shark's reading of § 8127(d) were correct. *See Veterans Contracting Grp., Inc. v. United States*, 920 F.3d 801, 806–07 (Fed. Cir. 2019).

Even if Land Shark's premise was established, because the government incorporated ***593** by amendment to the solicitation the statement that "price reasonableness shall be in accordance with FAR 13.106-3," J.A. 179, the contracting officer had to perform an analysis after the fact to "determine that the proposed price is fair and reasonable." FAR 13.106-3. To the extent that Land Shark disagrees, it must either challenge the validity of FAR 13.106-3 in light of 38 U.S.C. § 8127(d) or challenge the application of FAR 13.106-3 to this solicitation. Challenges to the validity of a regulation governing a procurement must be brought in federal district court under the Administrative Procedure Act. *Southfork Sys., Inc. v. United States*, 141 F.3d 1124, 1135 (Fed. Cir. 1998). Therefore, this argument exceeds the Court of Federal Claims' jurisdiction. And Land Shark has forfeited any challenge to the application of FAR 13.106-3 to this solicitation by not raising it while the procurement was pending, as it was clear from the solicitation's terms that a price reasonableness determination would be performed accordingly. *See Blue & Gold, Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007) ("[A] party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.").

Land Shark's second argument is that the contracting officer's price reasonableness analysis was improper. Land Shark argues that the contracting officer did not follow the method for analyzing SDVOSB posted on the VA website. This argument is unavailing because the VA website is not a regulation that the contracting officer was required to follow and because the discussion that Land Shark refers to concerned FAR Part 15, not FAR 13.106-3. Land Shark also argues that the contracting officer erred because "the CO also did not administer the three prongs of the FAR 13.106-2(b)." Appellant's Br. at 26. But FAR 13.106-2(b) does not have three prongs. It is true that the solicitation stated that the VA would perform reasonableness analysis based on three factors: price, past performance, and technical factors. J.A. 78–79. However, nowhere was there a requirement that the contracting officer continue through the other evaluation factors after determining that price was not fair and reasonable.

Land Shark has failed to state a claim because it has not alleged facts "plausibly suggesting (not merely consistent with)" entitlement for relief. *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955 (2007). Land Shark has waived part of its first argument, and the Court of Federal Claims did not have jurisdiction to hear the part of Land Shark's first argument that has not been waived. And Land Shark has not alleged facts that plausibly support its second argument. For these reasons, we agree with the trial court that Land Shark failed to state a claim upon which relief could be granted.

V

We have considered the parties' remaining arguments and find them unpersuasive. Because Land Shark has failed to state a claim upon which relief could be granted, we affirm the Court of Federal Claims' decision.

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AFFIRMED

All Citations

842 Fed.Appx. 589

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B- 419754 (Comp.Gen.), B- 419754.2, 2021 CPD P 208, 2021 WL 2394669

COMPTROLLER GENERAL

Matter of: Gulf Civilization General Trading & Contracting Company

June 10, 2021

***1** Gabriel Grillo, Gulf Civilization General Trading & Contracting Company, and Fred A. Joshua, Esq., Fred A. Joshua P.C., for the protester.
Ahmad Al-Far, Asahi General Trading & Contracting Company, for the intervenor.
Robin E. Walters, Esq., and Michael J. Kerrigan, Esq., Defense Logistics Agency, for the agency.

Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the agency's evaluation of proposals and basis for award were inconsistent with the solicitation's requirements is denied where the agency's evaluation was consistent with the solicitation's unambiguous requirements, and the protester's objections otherwise constitute untimely challenges to the terms of the solicitation.

2. Protester is not an interested party to challenge the evaluation of the awardee's proposal and resulting award decision where the protester fails to demonstrate that it would have a substantial chance of receiving the award even if our Office were to sustain its protest.

DECISION

Gulf Civilization General Trading and Contracting Company, of Al Salhiya, Kuwait, protests the award of a contract to Asahi General Trading & Contracting Company, of Al Ahmadi Governorat, Kuwait, under request for proposals (RFP) No. SP4510-21-R-0001, which was issued by the Defense Logistics Agency (DLA), for excess personal property management services, material handling equipment repair and maintenance services, and janitorial services in support of DLA's Disposal Support Office at Camp Arifjan, Kuwait. The protester generally challenges the methodology used to evaluate proposals, the specific evaluation of the awardee's proposal, and the resulting award decision.

We deny the protest.

BACKGROUND

The RFP, which was issued on December 15, 2020, and subsequently amended twice, sought proposals for excess personal property management services, material handling equipment repair and maintenance services, and janitorial services in support of DLA's Disposal Support Office at Camp Arifjan, Kuwait. The RFP was issued pursuant to Federal Acquisition Regulation (FAR) part 12 and the streamlined acquisition procedures of FAR subpart 13.5. The RFP contemplated the award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract against which the agency can award fixed-price orders. Agency Report (AR), Tab 1, RFP, at 38, 62. The RFP contemplated that the IDIQ contract would have a 12-month base period, and two, 12-month option periods. *Id.* at 20. Award was to be on a best-value tradeoff basis, considering (1) past performance and (2) price; past performance was significantly more important than price. AR, Tab 1, RFP, amend. 2, at 28.

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***2** As to past performance, offerors were required to provide relevant information for up to six references regarding the level of performance, in terms of delivery and quality achieved, under either U.S. government or commercial contracts for the same or similar services for performance in the U.S. Central Command area of responsibility during the last five years. *Id.* at 27. The information submitted was required to be sufficient to allow the agency to qualitatively review the offeror's performance, and/or the offeror's record of performance in the areas of: conforming to specifications; adhering to contract schedule; history of reasonable and cooperative behavior; commitment to customer satisfaction; and business-like concern for the interest of the customer. *Id.* Offerors were also required to provide to their respective past performance references the past performance questionnaire included as attachment 8 to the RFP. *Id.*

DLA was to evaluate the offeror's past performance and experience. For past performance, the agency was to evaluate: conformance to specifications and standards of good workmanship; adherence to contract schedules, including the administrative aspects of performance; history of reasonable and cooperative behavior; commitment to customer satisfaction; and business-like concern for the interests of the customer. *Id.* at 28. As to experience, DLA would evaluate whether the offeror had performed the same or similar contracts in terms of complexities of the services provided. *Id.*

As to price, the RFP provided that "[p]rice will not be numerically scored, but it will be fully evaluated using price analysis techniques." *Id.* at 28.

Although the RFP contemplated a best-value tradeoff between past performance and price, the RFP did not guarantee that the agency would evaluate all proposals. Rather, the RFP incorporated an "Efficiency Competition" provision that provided that:

> Offerors are advised that the US Government may not evaluate the past performance proposals of all offerors under this RFP. The US Government will first review the total evaluated price of all proposals received. The past performance proposals of those offerors whose pricing is determined by the Contracting Officer to be most competitive may be reviewed prior to, or instead of, other past performance proposals received. Based on the initial review of these past performance proposals, the US Government may not evaluate the past performance proposals of other offerors, whose total evaluated pricing was higher than that of one already evaluated and already assigned the highest possible past performance rating. This would occur when the Contracting Officer determines that any possible past performance superiority of an unevaluated (and higher priced) past performance proposal, over (a lower priced) one that was already evaluated and assigned the highest possible past performance rating, would not warrant any additional price premium.

***3** *Id.*

DLA ultimately received 25 proposals in response to the RFP. AR, Tab 2, Simplified Acq. Award Documentation, at 3. Consistent with the efficiency competition provision, DLA first ranked the proposals by price. Relevant here, Asahi submitted the second lowest-proposed price, and Gulf Civilization's proposed price ranked twelfth. *Id.* at 4-5. DLA then proceeded to evaluate the past performance of the two lowest-priced proposals. Based on that evaluation, DLA evaluated those proposals as follows:

	Total Evaluated Price (Rank)	Past Performance
Offeror A	$1,317,324 (1)	Unknown
Asahi	$1,978,552 (2)	Substantial Confidence

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Id. at 4 (prices rounded to nearest whole dollar).

The contracting officer then conducted a tradeoff between the two lowest-priced proposals. Consistent with the RFP's evaluation criteria, where past performance was significantly more important than price, the contracting officer determined that Asahi's substantial confidence past performance rating warranted the associated price premium, and, therefore, presented the best value to the government. *Id.* at 5. Based on Asahi proposing the second lowest proposed price and receiving the highest possible confidence rating, the contracting officer declined to consider the past performance for the remaining offerors in accordance with the RFP's efficiency competition provision. *Id.*

DISCUSSION

Gulf Civilization raises a number of challenges to the agency's evaluation of proposals and resulting award decision. First, the protester challenges the agency's methodology for evaluating proposals. In this regard, Gulf Civilization argues that DLA deviated from the RFP's requirements by failing to evaluate proposed prices for realism, and improperly converted this procurement to a *de facto* lowest-priced, technically acceptable (LPTA) procurement by limiting the agency's evaluation of proposals to the lowest-priced offerors. Second, Gulf Civilization challenges the agency's evaluation of Asahi's proposal. The protester primarily alleges that DLA erred in assessing the awardee's past performance as warranting a substantial confidence assessment because the awardee did not present past performance demonstrating the same or similar contracts in terms of complexities as to each of the RFP's required services. For the reasons that follow, we find no basis on which to sustain the protest. [1]

Challenges to the RFP's Evaluation Scheme

***4** Gulf Civilization raises a number of challenges to the agency's methodology for evaluating proposals. For the reasons that follow, we find no merit to these arguments because they are inconsistent with the unambiguous evaluation scheme set forth in the RFP or otherwise present untimely challenges to the RFP's express terms.

First, Gulf Civilization alleges that DLA failed to conduct a price realism evaluation as required by the solicitation. Specifically, the protester argues the RFP contemplated that the agency would conduct a price realism evaluation when it directed that price would be "fully evaluated using price analysis techniques." AR, Tab 1, RFP, amend. 2, at 28. We disagree.

As a general matter, when awarding a fixed-price contract, an agency is only required to determine whether offered prices are fair and reasonable. FAR 15.402(a). An agency's concern in making a price reasonableness determination focuses primarily on whether the offered prices are higher than warranted, as opposed to lower. *Louis Berger Power, LLC*, B-416059, May 24, 2018, 2018 CPD ¶ 196 at 8. An agency may also provide in the solicitation for the use of a price realism analysis for the purpose of measuring the vendor's understanding of the requirements or to assess price risk in its proposal. *Gulf Civilization Gen. Trading & Contracting Co.*, B-417586, Aug. 23, 2019, 2019 CPD ¶ 300 at 7. However, absent a solicitation provision providing for a price realism evaluation--or expressly stating that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and a proposal can be rejected for offering low prices--agencies are neither required nor permitted to conduct one in awarding a fixed-price contract. *Id.*

Here, the RFP did not provide for a price realism evaluation. Rather, the RFP merely provided that price would "be fully evaluated using price analysis techniques." AR, Tab 1, RFP, amend. 2, at 28. To the extent that the protester contends that "price analysis" implied that the agency would conduct a price realism analysis, we disagree. Indeed, the term "price analysis" as used in the FAR relates to price reasonableness, not price realism. *See* FAR 15.404-1(a)(3) ("Price analysis should be used to verify that the overall price offered is *fair and reasonable.*") (emphasis added). In any event, consistent with the decisions discussed above, absent a provision expressly requiring a price realism evaluation--or a clear direction that the agency would

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evaluate proposed prices to evaluate technical understanding and could reject proposals with low prices--DLA was prohibited from conducting a price realism evaluation under these circumstances.

***5** Furthermore, to the extent that the protester is arguing that the solicitation should have required a price realism analysis, such an argument is an untimely challenge to the terms of the solicitation. Our Bid Protest Regulations contain strict rules for the timely submission of protests. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); *Gulf Civilization Gen. Trading & Contracting Co.*, *supra*, at 8 n.9.

Next, Gulf Civilization challenges DLA's decision to evaluate the past performance of only the two lowest-priced proposals under the RFP's efficiency competition provision. The protester contends that the agency's decision not to evaluate additional proposals effectively and improperly converted this procurement to a *de facto* LPTA procurement in contravention of the RFP's stated best-value basis of award. In this regard, the protester contends that, even assuming Asahi's past performance warranted a substantial confidence assessment, the agency nevertheless failed to consider qualitative differences among proposals that could--and should--have been rated substantial confidence (including the protester's relevant incumbent past performance). As with its challenge to the agency's alleged failure to conduct a price realism evaluation, the protester's challenge to the agency's use of the efficiency competition provision is without merit.

First, we disagree with the protester that the efficiency competition provision improperly converted the basis of award from best value to LPTA. This procurement, conducted pursuant to streamlined procedures under FAR subpart 13.5, did not contemplate a traditional best-value tradeoff as contemplated under the requirements of FAR part 15. In this regard, unlike a FAR part 15 best-value tradeoff, where the agency would generally be required to consider qualitative differences among all proposals (including those with the same overall adjectival ratings), the RFP here explicitly provided that DLA could limit its best-value tradeoff to the lowest priced offeror(s) and the offeror with the lowest total proposed price and substantial past performance. As addressed above, DLA's source selection was consistent with the RFP's stated streamlined procedures when it conducted a tradeoff between Offeror A's lower-priced proposal and Asahi's higher-priced proposal and substantial confidence past performance. Thus, the protester's allegation that DLA made award on a LPTA basis is plainly belied by the record.

In any event, even assuming that DLA's use of the efficiency competition provision resulted in a *de facto* LPTA basis of award, Gulf Civilization's post-award protest is patently untimely where the RFP's proscribed evaluation scheme unambiguously reserved DLA's right to conduct the procurement in the exact manner that it did here. In this regard, the RFP unambiguously provided that: "[b]ased on the initial review of these past performance proposals, the US Government may not evaluate the past performance proposals of other offerors, whose total evaluated pricing was higher than that of one already evaluated and already assigned the highest possible past performance rating." AR, Tab 1, RFP, amend. 2, at 28. Thus, to the extent the protester is displeased that DLA conducted its procurement in the exact manner outlined by the RFP, the protester's objections are untimely raised. 4 C.F.R. § 21.2(a)(1); *Gulf Civilization Gen. Trading & Contracting Co.*, *supra*, at 8 n.10 (dismissing as untimely a similar post-award challenge to DLA's decision to limit its evaluation of past performance to the lowest-priced proposals). [2]

Interested Party

***6** As a consequence of the efficiency competition provision allowing DLA to limit its evaluation of proposals and Gulf Civilization's twelfth ranked price, we find that under the unique circumstances presented in this case, the protester has failed to establish that it had a substantial chance of receiving the award, and, therefore, it is not an interested party to pursue the remainder of its protest allegations.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557, only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit

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or relief sought by the protester, and the party's status in relation to the procurement. *DNC Parks & Resorts at Yosemite, Inc.*, B-410998, Apr. 14, 2015, 2015 CPD ¶ 127 at 12. Whether a protester is an interested party is determined by the nature of the issues raised and the direct or indirect benefit of the relief sought. *Id.*

In a post-award context, we have generally found that a protester is an interested party to challenge an agency's evaluation of proposals only where there is a reasonable possibility that the protester would be next in line for award if its protest were sustained. *CACI, Inc.-Fed.*, B-419499, Mar. 16, 2021, 2021 CPD ¶ 125 at 5; *OnSite Sterilization, LLC*, B-405395, Oct. 25, 2011, 2011 CPD ¶ 228 at 4. In this regard, we have explained that where there are intervening offerors who would be in line for the award even if the protester's challenge was sustained, the intervening offeror has a greater interest in the procurement than the protester, and we generally consider the protester's interest to be too remote to qualify as an interested party. *HCR Constr., Inc.; Southern Aire Contracting, Inc.*, B-418070.4, B-418070.5, May 8, 2020, 2020 CPD ¶ 166 at 6-7 n.6; *Automated Power Sys., Inc.--Recon.*, B-246795.2, Feb. 20, 1992, 92-1 CPD ¶ 208 at 2.

As an initial matter, we note that DLA, consistent with the RFP's efficiency competition provision, did not evaluate the past performance for any offerors beyond the lowest-priced proposal, which received an unknown confidence past performance rating, and Asahi's second lowest-priced proposal, which received a substantial confidence past performance rating. *See* AR, Tab 2, Simplified Acq. Award Documentation, at 4-5. In its legal memorandum responding to the protest, DLA argued that at least two intervening proposals demonstrated relevant experience in each of the types of services required by the RFP, and received favorable customer evaluations. *See* Legal Memorandum at 5. We note that we have previously declined to consider an agency's arguments that a protester is not an interested party to challenge an intervening offer where the agency did not contemporaneously evaluate the intervening offer. *See Lawson Envt'l Servs. LLC*, B-416892, B-416892.2, Jan. 8, 2019, 2019 CPD ¶ 17 at 3 n.3. Notwithstanding that DLA did not contemporaneously evaluate the past performance of the intervening nine proposals, we conclude that Gulf Civilization has failed to reasonably establish that it would be next in line for award if we were to otherwise sustain its protest.

***7** In this regard, the United States Court of Appeals for the Federal Circuit's recent decision in *HVF West, LLC v. United States*, 846 F. App'x 896 (Fed. Cir. 2021), emphasized a protester's obligation to affirmatively demonstrate its direct economic interest in order to establish that it is an interested party. In that case, the procuring agency issued a solicitation for the purchase and destruction of surplus government military property, including the requirement to demilitarize or mutilate the property. The solicitation contemplated the award to the firm presenting the highest price per pound for the property, and that met certain non-price criteria (*e.g.*, technical ability to perform the work). *Id.* at 897. The procuring agency received four bids, including from the awardee and the protester (who offered the lowest proposed-price). After ranking the four offers by price, the contracting officer only evaluated the technical acceptability of the offeror that proposed the highest bid. *Id.* The protester challenged the technical acceptability of the awardee, as well as raising collateral challenges to the agency's evaluation of the two intervening offerors. *Id.* at 897-898.

The United States Court of Federal Claims sustained the protest, finding that the awardee failed to satisfy all of the non-price criteria. *Id.* at 898. On appeal, the Federal Circuit reversed the Court of Federal Claims's decision, holding that the protester did not demonstrate that it was an interested party where it failed to advance non-speculative allegations with respect to the technical acceptability of the two intervening offerors. In this regard, the Federal Circuit emphasized that to succeed in showing that it has a direct economic interest to be an interested party, a protester must make a sufficient showing that it had a "substantial chance" of winning the contract. *Id.* at 898 (*quoting Eskridge & Assocs. v. United States*, 955 F.3d 1339, 1345 (Fed. Cir. 2020)). The Federal Circuit explained that to demonstrate a substantial chance of winning the award, the protester had to sufficiently challenge the eligibility of not only the awardee, but also the intervening offerors. *HVF West*, 846 F. App'x at 898 (citations omitted). Notwithstanding that the procuring agency had not contemporaneously evaluated the technical acceptability of the intervening offers, the Federal Circuit held that the protester failed to establish that it was an interested party to challenge the agency's award decision where it failed to mount any credible challenges to the technical acceptability of the better price-ranked offers in line and in front of the protester. *Id.* at 899.

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***8** Consistent with the Federal Circuit's *HVF* decision, we find that the protester has failed to establish that it had a substantial chance of winning the contract where it failed to advance any credible protest grounds challenging the standing of the nine intervening offerors. Specifically, the agency provided the protester with sufficient information upon which it could-- and should have--challenged its relevant standing with respect to the intervening offerors. Specifically, DLA's agency report disclosed the identities of the nine intervening offerors, as well as produced the complete past performance proposal volumes and past performance questionnaires for at least two of the intervening offerors. AR, Tab 2, Simplified Acq. Award Documentation, at 4; Tabs 9 and 10, Past Performance Proposals & Past Performance Questionnaires. Gulf Civilization obtained the assistance of outside counsel, who requested and was granted admission to a protective order permitting him access to the unredacted record, including the above information. Further, the protester also indicated that it was otherwise aware of the identity (and price ranking) of the offeror that proposed the third-lowest proposed price. *See* Protester's Comments at 20-21.

Thus, here, upon receipt of the agency report, the protester knew: (1) that its proposed price was the twelfth highest, (2) that the RFP allowed DLA to limit its evaluation to those proposals offering the lowest proposed prices and substantial past performance; (3) the identities of all the intervening offerors; and (4) the content of past performance volumes and past performance questionnaires for at least two intervening firms that DLA's *post hoc* evaluation argued also demonstrated substantial past performance.

Notwithstanding this information, the protester did not argue in its comments or a supplemental protest that none of the intervening firms could have obtained a rating of substantial confidence. Nor did the protester demonstrate how a firm with the twelfth highest price would have had a substantial chance for award if we sustained its protest challenging the evaluation of only Asahi's proposal. Similar to the Federal Circuit's holding in *HVF*, our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds of protest including either evidence or allegations sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. 4 C.F.R. §§ 21.1(c)(4) and (f); *CDO Techs., Inc.*, B-416989, Nov. 1, 2018, 2018 CPD ¶ 370 at 5. Under the unique circumstances presented here, we find that the protester has failed to demonstrate a sufficient showing that it is an interested party to pursue its challenge of the award to Asahi, and, therefore, we dismiss the remaining protest allegations.

***9** The protest is denied.

Thomas H. Armstrong
General Counsel

1 Gulf Civilization raises a number of collateral arguments. Although our decision does not address each of these arguments, we have reviewed all of the protester's arguments and find that none provides a basis on which to sustain the protest. For example, Gulf Civilization alleges that DLA improperly relaxed the RFP's anticipated March 2021 contractual start date when the contract as awarded commenced in April 2021. *See* Protest at 7. DLA responds that the delay was primarily required due to additional time needed to complete the Joint Contingency Contracting System (JCCS) process to allow the contractor to access the U.S. base. DLA asserts, however, that the delayed commencement date did not change the scope of work, the evaluation scheme, or the length of time the contractor will be obligated to perform. *See* Legal Memorandum at 4, 16. DLA asserts that the same delay would have similarly impacted Gulf Civilization's ability to timely begin performance if it had been selected for award. *Id.* at 16.
Additionally, the agency notes that this is an IDIQ contract, and the government is not obligated to issue any orders beyond the contract's minimum guarantee, so any delay in the commencement of the IDIQ ordering period could not reasonably have prejudiced the protester. *Id.* We find no basis to sustain the protest on this basis. As we have explained, even if a contract as awarded has a later start date (and thus a later potential end date), when the different start date does not change the statement of work, the evaluation scheme, or the length of time for which the contractor would be obligated, there is no requirement that new offers be obtained from offerors. *Avar Consulting, Inc.*, B-417668.3, *et al.*, June 10, 2020, 2020 CPD ¶ 191 at 7; *Mark Dunning Indus., Inc.*, B-405417.2, Nov. 19, 2013, 2013 CPD ¶ 267 at 4.

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Absent any evidence that the delayed commencement of the IDIQ ordering period had any impact on the evaluation or scope of work solicited by the agency, such a delay provides us with no basis to question the agency's underlying evaluation and award.

2 Gulf Civilization also alleges that the RFP's efficiency competition provision is based on the application of FAR section 15.306(c)(2)'s principles for establishing a competitive range among "the greatest number that will permit an efficient competition among the most highly rated proposals." *See* Protester's Comments at 3. This argument fails for at least two independent reasons. First, this procurement was not conducted using FAR part 15 procedures for negotiated procurements. Rather, it was conducted on the basis of the streamlined acquisition procedures of FAR subpart 13.5. Thus, FAR part 15 principles are inapplicable. In this regard, we note that Gulf Civilization raised--and we previously rejected-- a nearly identical argument in an earlier, unrelated protest. *See Gulf Civilization Gen. Trading & Contracting Co.*, *supra*, at 8 n.10. Second, even assuming for the sake of argument that FAR part 15 principles did or should apply by analogy, as explained above, the protester's post-award objections to the RFP's unambiguous reservation of DLA's right not to evaluate proposals in a manner consistent with a FAR part 15 procurement are patently untimely. 4 C.F.R. § 21.2(a)(1).

B- 419754 (Comp.Gen.), B- 419754.2, 2021 CPD P 208, 2021 WL 2394669

End of Document

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846 Fed.Appx. 896
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. Fed. Cir. Rule 32.1.
United States Court of Appeals, Federal Circuit.

HVF WEST, LLC, Plaintiff-Appellee
v.
UNITED STATES, Defendant-Appellant
Lamb Depollution, Inc., Defendant-Appellant

2020-1414, 2020-1583
|
Decided: February 19, 2021

Synopsis

Background: Disappointed bidder filed post-award bid protest challenging Defense Logistics Agency's (DLA) award of contract for purchase and destruction of government military property, and seeking permanent injunction to prevent continued performance of contract until sales contracting officer (SCO) obtained information concerning other bidders and evaluated them according to terms of solicitation. Following intervention by awardee, as defendant-intervenor, parties cross-moved for judgment on administrative record, and defendants moved to dismiss for lack of subject matter jurisdiction and for lack of standing. The Court of Federal Claims, Margaret M. Sweeney, Chief Judge, 146 Fed.Cl. 314, granted plaintiff's motion and denied defendants' motions. Defendants appealed.

[Holding:] The Court of Appeals, Clevenger, Circuit Judge, held that plaintiff lacked standing because it was not an "interested party" with direct economic interest in the contract.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Lack of Subject Matter Jurisdiction; Motion for Judgment on Administrative Record; Motion to Dismiss for Lack of Standing.

West Headnotes (1)

[1] **Public Contracts** Parties; standing
United States Parties; standing

Bid protestor was not an "interested party" with direct economic interest in Defense Logistics Agency (DLA) Disposition Services' contract for purchase and destruction of surplus government military property, which called for or the performance of demilitarization or mutilation services for the agency by the winning bidder, and thus, protestor lacked standing, under Tucker Act, to assert protest of the award of the contract, where protestor's speculative conclusions failed to mount credible challenge to the technical acceptability of better price-ranked bidders in line and in front of protestor and thereby failed to show it had a substantial chance of winning the award for the solicitation. 28 U.S.C.A. § 1491(b)(1).

3 Cases that cite this headnote

Appeals from the United States Court of Federal Claims in No. 1:19-cv-01308-MMS, Chief Judge Margaret M. Sweeney.

Attorneys and Law Firms

Edward Sanderson Hoe, Covington & Burling LLP, Washington, DC, argued for plaintiff-appellee. Also represented by Andrew Guy, Darby Rourick.

Steven Michael Mager, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellant United States. Also represented by Jeffrey B. Clark, Robert Edward Kirschman, Jr., Douglas K. Mickle.

Shar Bahmani, Sacks Tierney P.A., Scottsdale, AZ, argued for defendant-appellant Lamb Depollution, Inc. Also represented by Joe Keene.

Before Prost, Chief Judge, Clevenger and Hughes, Circuit Judges.

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Opinion

Clevenger, Circuit Judge.

***897** The United States ("Government") and Lamb Depollution, Inc. ("Lamb") appeal the final judgment of the United States Court of Federal Claims ("Claims Court") in this bid protest case holding that it had subject matter jurisdiction to hear HVF West, LLC's ("HVF") bid protest claim and that HVF had standing to bring the claim, and further granting HVF's motion for judgment on the administrative record. *HVF West, LLC v. United States*, 146 Fed. Cl. 314 (2019). For the reasons set forth below, we *reverse*.

I

The contract in suit stems from a solicitation issued by the Defense Logistics Agency Disposition Services ("agency") for the purchase and destruction of surplus Government military property. Prior to taking title of the purchased property, the contractor was required to demilitarize or mutilate the property to prevent design information from being released. The contractor would then own the scrap residue resulting from the property's destruction.

The solicitation described itself as a "sales contract," but clearly called for the performance of demilitarization or mutilation services for the agency by the winning bidder. The solicitation requested that sealed bids include only the price that the contractor would pay per pound for the property. Although bidders were required to meet certain non-price criteria (e.g., technical ability to perform the work), the solicitation did not clearly indicate whether all bidders would be evaluated together under the criteria or whether only the highest bidder's non-price qualifications would be evaluated. The agency's contracting officer ("CO") received four bids in total. Lamb had the highest bid and HVF had the lowest bid with two other bidders in between. The CO only evaluated the non-price criteria for Lamb, and awarded the contract to Lamb after finding it met all the non-price criteria. HVF unsuccessfully protested the award to Lamb, first at the agency, and then at the Government Accountability Office ("GAO"), and finally filed a bid protest suit in the Claims Court.

28 U.S.C. § 1491(b)(1) vests the Claims Court with jurisdiction to hear bid protest claims by an interested party in connection with a procurement contract. In order to have standing to bring the bid protest, a losing bidder must show that it had a substantial chance of winning the contract but for the alleged error. HVF argued that the contract at issue called for a procurement of services and thus satisfied § 1491(b)(1). Although HVF was fourth in line on price, it asserted that it had standing to protest the contract award based upon detailed allegations in the complaint that Lamb had failed to satisfy specific non-price criteria required under the "pre-award survey," and that the two other intervening bidders "failed to meet the standards for a successful pre-award survey." J.A. 59. In its motion for judgment on the administrative record, HVF further alleged that two intervening bidders were ineligible to receive the contract either because they lacked experience in demilitarization services or had never received a federal contract with a money obligation as great as the one for the contract at issue. By challenging the qualification of the ***898** price winner, Lamb, and questioning the two intervening and better-priced bidders, HVF claimed that it had a substantial chance of receiving the award. Thus, according to HVF, the Claims Court had subject-matter jurisdiction over its complaint, it had standing to protest the contract award, and it could show that the CO had erred in finding that Lamb satisfied all the non-price criteria required for the award of the contract. Lamb and the Government challenged the subject-matter jurisdiction of the Claims Court on the ground that the contract was in connection to a sale of property, rather than procurement of property or services, and alleged that HVF lacked standing to bring the claim. Lamb further alleged that the CO had correctly determined that Lamb met all the non-price criteria.

In its final judgment on the administrative record, the Claims Court held that the solicitation's procurement of services provided more than a de minimis value to the agency sufficient to meet the jurisdictional statute, that HVF satisfied the legal test for standing, and that HVF successfully showed that the CO erred in finding Lamb satisfied all non-price criteria in the solicitation. Accordingly, the Claims Court ordered the agency to cancel the contract awarded to Lamb.

II

Lamb and the Government timely appeal from the final decision of the Claims Court. We have jurisdiction under 28 U.S.C. § 1295(a)(3) and review questions of standing de novo. *Am. Fed'n of Gov't Emps. v. United States*, 258 F.3d 1294, 1298 (Fed. Cir. 2001).

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Lamb and the Government argue that the solicitation does not satisfy the jurisdictional requirements of § 1491(b)(1) because it is for a contract for sale of property rather than for a procurement of property or services, and any services required in the solicitation are merely a condition to sale that does not transform the underlying nature of the contract. Lamb also challenges HVF's standing and asserts error in the Claims Court's finding that Lamb failed to satisfy all the non-price criteria. Because we hold that HVF lacks standing to bring the protest, we reverse on that ground and do not reach the other grounds for reversal argued by Lamb and the Government.

III

Standing under § 1491(b)(1) "imposes more stringent standing requirements than Article III" by requiring the losing bidder to be an "interested party." *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009). We have held that an interested party is an actual or prospective bidder whose "direct economic interest would be affected by the award of the contract or by failure to award the contract." *Am. Fed'n*, 258 F.3d at 1302. To succeed in showing that it had a direct economic interest, HVF had to make a sufficient showing that it had a "substantial chance" of winning the contract. *Eskridge & Assocs. v. United States*, 955 F.3d 1339, 1345 (Fed. Cir. 2020).

In order for HVF to show that it had a substantial chance of winning the award for this solicitation, it had to sufficiently challenge the eligibility of Lamb and both of the intervening bidders. *See, e.g.*, *United States v. Int'l Bus. Machines Corp.*, 892 F.2d 1006, 1010 (Fed. Cir. 1989); *Eskridge*, 955 F.3d at 1344 (protesting party lacked standing upon failure to "make a credible challenge to the technical acceptability of four lower [price] bids"). However, HVF only proffers allegations based upon conjecture that are insufficient to show it had a substantial chance of winning the award. *See* ***899** *Bannum, Inc. v. United States*, 404 F.3d 1346, 1358 (Fed. Cir. 2005) ("There is nothing besides Bannum's conjecture to support the contention that another review ... would provide it a substantial chance of prevailing in the bid."). In its complaint, HVF alleged only that the intervening bidders "failed to meet the standards for a successful pre-award survey." J.A. 59. This conclusory statement is insufficient to question the eligibility of the intervening bidders.

In an attempt to support its allegation with extrinsic evidence, HVF purported that the website of one intervening bidder made no mention that the company performed demilitarization work or would be capable of performing such work. However, these speculative assertions do not account for the fact that the solicitation stated that non-price considerations, such as experience, could be demonstrated through the facilities of a subcontractor and need not be shown through a bidder's own facilities. HVF also alleged that the individual representing the other intervening bidding entity had never received a federal contract that was close to the value of the contract at issue. But this does not indicate on its own that the intervening bidding entity, rather than its associated individual, would have been unable to fulfill the contract.

Again, HVF's speculative conclusions fail to provide a sufficient reason to question the eligibility of the intervening bidders. *See Orbital Maint. & Constr. Co. v. United States*, 145 Fed. Cl. 71, 76 (2019) (determining that plaintiff failed to challenge the two other offerors' eligibility because its arguments were highly speculative and thus, it had no standing); *see also Esilux Corp.*, B-234689, 89-1 CPD ¶ 538, (Comp. Gen. June 8, 1989) (protester had no standing because it failed to provide support for bare allegations that the second-lowest offeror was not responsible and its offer unacceptable). Without more, HVF falls short of the threshold to establish it had a substantial chance of winning the award. *Cf. Hyperion, Inc. v. United States*, 115 Fed. Cl. 541, 550 (2014) (plaintiff had standing because it adequately alleged that three lower-priced proposals were improperly considered technically acceptable); *Bluewater Mgmt. Grp., LLC v. United States*, 150 Fed. Cl. 588, 608–09 (2020) (plaintiff substantively alleged with detailed reference to specific contract requirements that two lower-priced bidders had non-compliant or deficient bids, which was sufficient to establish that it had a substantial chance of winning).

The Claims Court's decision, entered on November 22, 2019, did not have the benefit of our subsequent decision in *Eskridge*. In that case, we made clear that even when an agency assesses price-ranked bidders together for technical compliance to select the bid most advantageous to the Government, as HVF asserts the agency should have done in this solicitation, the least favored price-ranked bidder has standing only upon mounting a credible challenge to the technical acceptability of the better price-ranked bidders in line and in front of the protesting party. In this case, HVF failed to mount such a challenge.

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IV

For the foregoing reasons, we *reverse* the Claims Court's judgment that HVF had standing to bring its bid protest suit. This case is remanded to the Claims Court for dismissal of HVF's complaint.

REVERSED AND REMANDED

COSTS

No costs.

All Citations

846 Fed.Appx. 896

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U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

May 10, 2018

Congressional Committees

Defense Contracting: Use by the Department of Defense of Indefinite-Delivery Contracts from Fiscal Years 2015 through 2017

The National Defense Authorization Act for 2017 contained a provision for us to report on the use by the Department of Defense (DOD) of indefinite-delivery contracts during fiscal years 2015 through 2017. Indefinite-delivery contracts are awarded to one or more contractors to acquire products and/or services when the government does not know at the time of award the exact times and/or exact quantities of future deliveries. The government then places orders through the indefinite-delivery contract when it knows the timing and quantity of its needs. This report identifies (1) policies and guidance DOD uses regarding indefinite-delivery contracts; (2) characteristics of DOD indefinite-delivery contracts for fiscal years 2015 through 2017, including the number of contracts, obligations on orders, and extent of competition; and (3) the extent to which selected DOD indefinite-delivery contracts may have limited future opportunities for competition.

In summary, DOD largely relies on subpart 16.5 of the Federal Acquisition Regulation (FAR) and subpart 216.5 of the Defense Federal Acquisition Regulation Supplement regarding indefinite-delivery contracts, with supporting guidance at the military department level. Roughly 40 percent of DOD contract obligations in fiscal years 2015 through 2017 were on indefinite-delivery contracts. Of the DOD awards for the indefinite-delivery / indefinite-quantity (IDIQ) contract type during this period, about three-quarters were made to a single contractor, rather than multiple contractors.[1] In general, for the IDIQ contracts we reviewed, DOD included ordering provisions that contemplated competition among the contract holders for subsequent orders.[2] However, nearly all of the contracts we reviewed contained provisions that, while not explicitly limiting competition, may have the potential, under certain circumstances, to reduce the number of contractors who are eligible to compete for the orders. Generally these provisions were in service of some other goal, such as increasing federal contracting opportunities for small businesses by setting aside certain task or delivery order competitions among these firms. We are not making any recommendations in this report. The enclosure contains our detailed analysis.

[1]With limited exceptions, the FAR requires contracting officers, to the maximum extent practicable, to give preference to making multiple awards of IDIQ contracts. Under this approach, the government seeks to award multiple contracts under a single solicitation for the same or similar supplies or services. However, the FAR also establishes that there are times where contacting officers must not use the multiple award approach – including when it is not in the best interest of the government.

[2]When multiple indefinite-delivery contracts have been awarded, the competition requirements of FAR part 6 do not apply when placing orders; however, the government generally must provide each awardee a fair opportunity to be considered for each order. FAR § 16.505 (b)(1) describes the competitive procedures to be used, as well as exceptions to the fair opportunity process. For the purposes of this report, we refer to orders awarded using the fair opportunity procedures to be "competitive" and those that were awarded using one of the exceptions as "non-competitive."

To conduct this work, we collected DOD policies and guidance relevant to indefinite-delivery contracts from DOD officials and reviewed them. To identify the characteristics of DOD indefinite-delivery contracts for fiscal years 2015 to 2017, we collected and analyzed data on the number of contracts and extent of competition on indefinite-delivery contracts and orders under them in fiscal years 2015 through 2017 from the Federal Procurement Data System—Next Generation (FPDS-NG). We also analyzed FPDS-NG data on obligations on task and delivery orders under indefinite-delivery contracts for fiscal years 2015 through 2017.[3] We assessed the reliability of the data we used by electronically testing for missing data, outliers, and inconsistent coding. We determined the data to be sufficiently reliable for the summary-level data provided in this report. To identify the extent to which selected DOD contracts may have limited future opportunities for competition, we selected a non-generalizable set of nine of the largest DOD multiple-award IDIQ contracts for review (one each awarded by the Air Force, Army, and Navy in fiscal years 2015, 2016, and 2017). We focused on IDIQ contracts for this analysis because they represent more than three-quarters of all indefinite-delivery contracts at DOD. We excluded IDIQ contracts awarded to a single contractor since the task orders under a single-award contract can only be issued to one contractor. We analyzed the ordering procedures from the selected contracts and assessed the extent to which these procedures may limit future opportunities for competition. We also reviewed GAO's recent work on IDIQ contracts.[4] In April 2017, we found that from fiscal years 2011 through 2015, agencies obligated more than $130 billion annually on IDIQ contracts, with DOD accounting for more than two-thirds of those obligations.

We conducted this performance audit from January 2018 through May 2018 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Agency Comments

We are not making any recommendations in this report. The Department of Defense had no comments on a draft of this report.

[3]The indefinite-delivery contracts under which orders were placed were not necessarily awarded in fiscal years 2015 to 2017, but they had obligations on orders during those fiscal years. Our report also provides information on the number of indefinite-delivery contracts DOD entered into in fiscal years 2015 to 2017 based on information in FPDS-NG. However, the overall value of these contracts cannot be reliably obtained through FPDS-NG.

[4]GAO, *Federal Contracts: Agencies Widely Used Indefinite Contracts to Provide Flexibility to Meet Mission Needs*, GAO-17-329 (Washington, D.C.: Apr. 13, 2017).

We are sending copies of this report to the appropriate congressional committees; the Secretary of Defense; and other interested parties. In addition, the report is available at no charge on the GAO website at http://www.gao.gov.

If you or your staff have any questions concerning this report, please contact me at (202) 512-4841 or by e-mail at woodsw@gao.gov. Contact points for our Office of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report were Janet McKelvey (Assistant Director); Scott Purdy (Analyst-in-Charge); Pete Anderson; Matthew T. Crosby; Lorraine Ettaro; Julia M. Kennon; Roxanna Sun; and Alyssa Weir.

William T. Woods
Director, Contracting and National Security Acquisitions

Enclosure

List of Congressional Committees

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Committee on Armed Services
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The Honorable Adam Smith
Ranking Member
Committee on Armed Services
House of Representatives

The Honorable Kay Granger
Chairwoman
The Honorable Pete Visclosky
Ranking Member
Subcommittee on Defense
Committee on Appropriations
House of Representatives

(102561)

Enclosure

May 2018

Defense Contracting

Use by the Department of Defense of Indefinite-Delivery Contracts from Fiscal Years 2015 through 2017

Background

The federal government obligates nearly $200 billion each year through the use of indefinite-delivery contracts, with DOD representing more than half of these dollars. Federal regulations define three types of indefinite-delivery contracts, each of which involves the placement of orders under the contract to meet individual requirements:

- definite-quantity contracts, which provide for the delivery of a definite quantity of specific products or services for a fixed period;
- requirements contracts, under which a contractor fulfills all requirements of a designated government activity for products or services over a specified period; and
- indefinite-quantity contracts, which provide for an indefinite quantity, within stated limits, of products or services during a fixed period.

Federal regulations establish a general preference for making multiple awards of IDIQ contracts. When multiple awards of such contracts are made, the government generally must provide each contractor a fair opportunity to be considered for each subsequent order. However, in certain circumstances, agencies can, and in some cases must, award indefinite-delivery contracts to a single contractor, in which case all subsequent orders are placed without additional opportunities for competition.

View GAO-18-412R. For more information, contact William T. Woods at (202) 512-4841 or woodsw@gao.gov

Findings

Policies and Guidance

Department of Defense (DOD) officials told us they primarily rely on subpart 16.5 of the Federal Acquisition Regulation (FAR) when using indefinite-delivery contracts. The FAR describes the three different indefinite-delivery contract types and establishes rules for ordering, including certain competitive procedures to be followed when placing orders under multiple-award contracts.

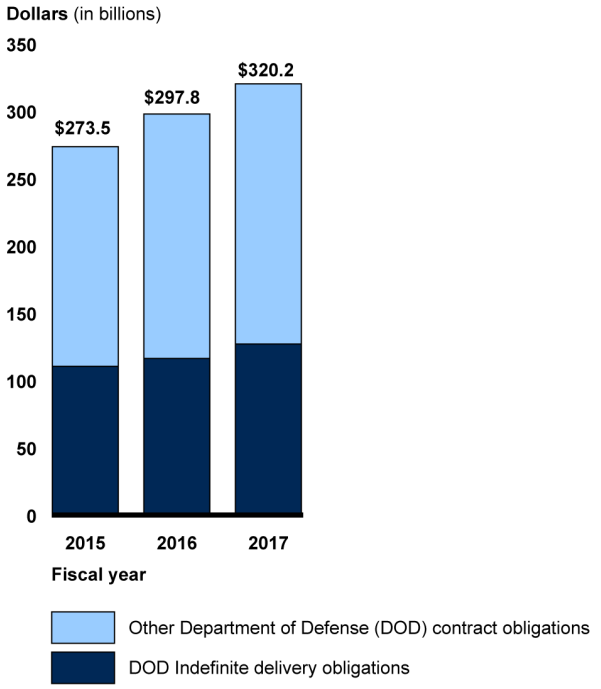
Additionally, DOD officials noted that there are supplemental regulations in the Defense Federal Acquisition Regulation Supplement (DFARS), which, for example, identify procedures for contracting officers to follow when they receive only one offer on task orders above a certain threshold. DOD's Procedures, Guidance, and Information established guidance for certain follow-on task orders awarded without competition.

Military department officials also indicated they primarily relied on the FAR and DFARS, and in some cases they identified limited supplemental guidance at the military department level. For example, both the Navy and Air Force provided additional guidance regarding approval authority for single-award indefinite-delivery contracts. In general, the policies and guidance we reviewed did not contain specific provisions on the appropriate number of contractors that should receive multiple-award indefinite-delivery contracts. However, the FAR provides factors to be considered when determining the appropriate number of indefinite-delivery / indefinite-quantity (IDIQ) contracts to be awarded.

Characteristics of Indefinite-Delivery Contracts

Orders under indefinite-delivery contracts comprised roughly 40 percent of DOD obligations in fiscal years 2015 through 2017 totaling more than $100 billion each year (see figure 1).

Figure 1: DOD Obligations on Orders under Indefinite-Delivery Contracts in Comparison with Total DOD Contract Obligations, Fiscal Years 2015 through 2017



Source: GAO analysis of Federal Procurement Data System - Next Generation. | GAO-18-412R

Figure 1 reflects all obligations on orders under indefinite-delivery contracts in each fiscal year, whether or not the contract itself was entered into during that fiscal year. In terms of contracts entered into by DOD during fiscal years 2015 through 2017, DOD mostly awarded single-award indefinite-delivery contracts, and most of these contracts were reported as having been competed (see table 1).

Table 1: Number of Indefinite-Delivery Contracts Entered into by the Department of Defense, Fiscal Years 2015 through 2017

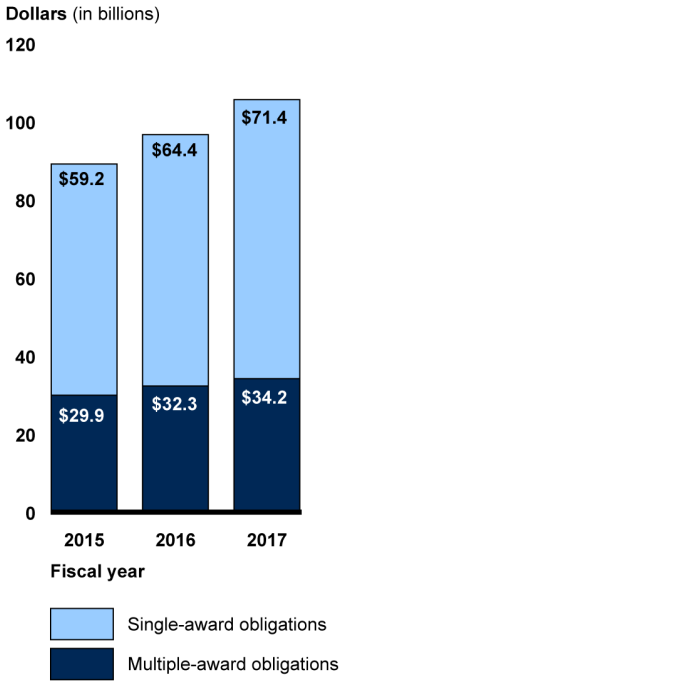
	2015	2016	2017
Single-award indefinite-delivery contracts (competed)	5603	4985	6262
Single-award indefinite-delivery contracts (not competed)	1999	2074	2069
Multiple-award indefinite-delivery contracts (all competed)	1984	1948	1423
Total indefinite-delivery contracts	**9586**	**9007**	**9754**

Source: GAO analysis of Federal Procurement Data System – Next Generation data. | GAO-18-412R

While there are three types of indefinite-delivery contracts, DOD obligated most of its dollars (more than 80 percent each year) on the IDIQ contract type. IDIQ contracts are used when the exact quantities and timing for future deliveries of products and/or services are not known at the time of award.

Pursuant to statute, the FAR establishes a general preference for multiple-award IDIQs but also states that there are times this approach should not be used. From fiscal years 2015 through 2017, DOD obligated about two-thirds of its IDIQ contract obligations on single-award IDIQ contracts (see figure 2). This proportion is consistent with our past findings on IDIQ contracts for fiscal years 2011 through 2015.

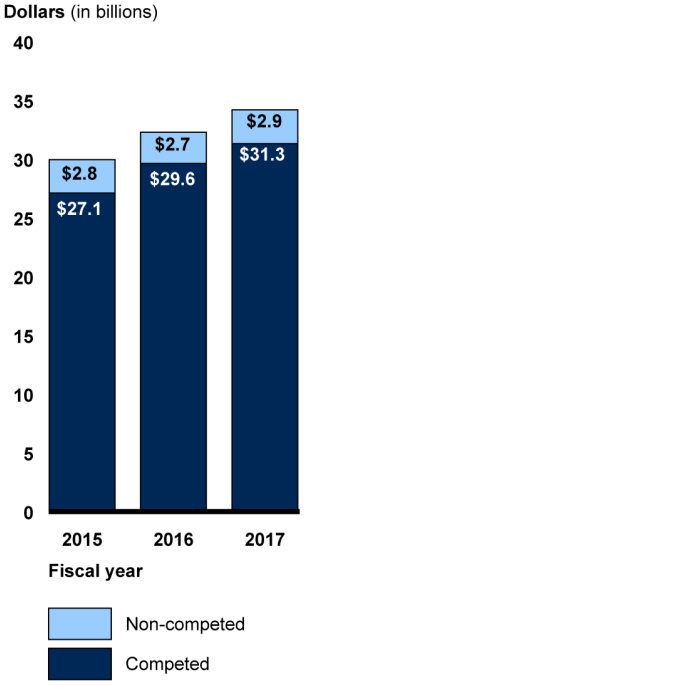
Figure 2: Department of Defense Single- and Multiple-Award Indefinite-Delivery / Indefinite-Quantity Contract Order Obligations, Fiscal Years 2015 through 2017



Source: GAO analysis of Federal Procurement Data System - Next Generation. | GAO-18-412R

Multiple-award IDIQ contracts are awarded to more than one contractor, and the contractors may then compete for subsequent orders issued under the contract. There are situations, however, where an agency may not compete a subsequent order based on certain exceptions (such as urgency). These exceptions are outlined in the FAR. In fiscal years 2015 through 2017, roughly 90 percent of DOD obligations on orders under multiple-award IDIQ contracts were competed (see figure 3).

Figure 3: Competition on Department of Defense Multiple-Award Indefinite-Delivery / Indefinite-Quantity Order Obligations, Fiscal Years 2015 through 2017



Source: GAO analysis of Federal Procurement Data System - Next Generation. | GAO-18-412R

Provisions Potentially Affecting Future Competition

The nine DOD multiple-award IDIQ contracts we reviewed all contained ordering provisions that contemplated competition among the contract holders for future orders. At the same time, eight of the nine contracts included provisions that, while not explicitly limiting competition, have the potential, in certain circumstances, to reduce the number of contractors who are eligible to compete for the orders. Based on our analysis, these provisions were generally intended to provide best value to the government or to serve other goals of government contracting, such as increasing federal contracting opportunities for small businesses, where appropriate. The provisions we identified, based on our review of the nine contracts, include:

- Six of the nine contracts contained provisions establishing that task or delivery order competitions would be set aside for small businesses under certain circumstances, such as a requirement below a certain dollar value or staffing threshold. Competition may still occur between small businesses.
- Six of the nine contracts contained provisions permitting DOD to eliminate a contractor from consideration for future orders—known as off-ramping—for reasons such as poor performance or infrequent responses on opportunities for task or delivery orders. While off-ramping could reduce competition by reducing the number of contractors eligible to compete for orders, these contracts generally also included procedures for on-ramping of additional contractors. In some instances, the use of on/off ramping may increase opportunities for competition, for example, when a contractor that was not responding to government requests for proposals is replaced by one who does.
- One contract included a provision stating that the agency reserved the right to issue the same order to all contract holders without holding a competition. Read in context with other provisions of the contract, however, this provision appeared to be part of a process that would allow the agency to select the most capable equipment through a down-select.

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B- 412755 (Comp.Gen.), 2016 CPD P 98, 2016 WL 1237962

COMPTROLLER GENERAL

Matter of: Aegis Defense Services, LLC

DOCUMENT FOR PUBLIC RELEASE The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

March 25, 2016

***1** J. Scott Hommer, III, Esq., Keir X. Bancroft, Esq., Randall K. Miller, Esq., Nathaniel S. Canfield, Esq., and Michael T. Francel, Esq., Venable LLP, for the protester.
Thomas G. Ward, Esq., C. Bryan Wilson, Esq., Lucas E. Beirne, Esq., and Shaun P. Mahaffy, Esq., Williams & Connolly, LLP; William K. Walker, Esq., Walker Reausaw; James H. Lister, Esq., Zacharia Olson, Esq., and Adam W. Cook, Esq., Birch Horton Bittner & Cherot; and Daniel S. Ward, Esq., Ward & Ward, PLLC, for the intervenor, Chenega–Patriot Group, LLC.
Kathleen D. Martin, Esq., Department of State, for the agency.

Elizabeth Witwer, Esq., and Jennifer Westfall–McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging award under a multiple award indefinite-delivery, indefinite-quantity contract is dismissed where the protester is also an awardee and has not established that it is an interested party to protest.

DECISION

Aegis Defense Services, LLC (Aegis), of McLean, Virginia, protests the award of an indefinite-delivery, indefinite-quantity (IDIQ) contract to Chenega–Patriot Group, LLC (CPG), of Chantilly, Virginia, under request for proposals (RFP) No. SAQMMA–15–R–0282, which was issued by the United States Department of State for protective security services to support the agency's global protective and security mission. Aegis alleges that the agency unreasonably awarded the contract to CPG after inadequately or incompletely investigating alleged violations of the Procurement Integrity Act (PIA) on the part of CPG.

We dismiss the protest.

The RFP, issued on May 15, 2015, contemplated the award of multiple IDIQ contracts, referred to as the Worldwide Protective Services (WPS) 2 contracts. RFP §B.2. Both Aegis and CPG were among the seven offerors that received an award of a WPS 2 IDIQ contract. Protest at 2; Contracting Officer's Statement, Feb. 24, 2016, at 4. In its protest, Aegis alleges that CPG improperly used Aegis's confidential, proprietary and trade secret information to secure an award. Protest at 2–3. Specifically, Aegis alleges that one of Aegis's former employees misappropriated Aegis's information and used that information to aid CPG in the development of its proposal in response to the WPS 2 RFP. *Id.*

On June 26, Aegis notified the contracting officer of CPG's potential violation of the PIA and requested that the agency investigate the matter and take necessary remedial action. Protest at 6; Contracting Officer's Statement at 5. The contracting officer represents that he conducted an investigation into Aegis's allegations and concluded that “there is no basis [to] determine

a PIA violation has occurred." Contracting Officer's Statement at 6, 9. On February 18, 2016, Aegis filed the subject protest challenging the sufficiency of the agency's investigation.

***2** On February 24, the agency requested dismissal of the protest, alleging that Aegis had failed to assert or demonstrate that it was competitively harmed, as required to support a challenge to an award based upon an allegation of a PIA violation. Agency Req. for Dismissal, Feb. 24, 2016. On February 25, our Office declined to dismiss the protest on the grounds asserted by the agency, but asked the protester to address whether, as an awardee under a multiple-award IDIQ contract, it possesses the requisite direct economic interest to pursue a protest against an award to another contractor.

Before Aegis could respond to our inquiry, however, CPG filed a request for dismissal based upon four independent grounds: (1) Aegis, as an awardee, is not an interested party; (2) Aegis's complaints are the subject of ongoing litigation in a court of competent jurisdiction; (3) Aegis's complaints have already been decided on the merits by a court of competent jurisdiction; and (4) Aegis's protest is untimely. CPG Req. for Dismissal, Feb. 29, 2016.

On March 4, Aegis filed a consolidated response to our inquiry and to CPG's request for dismissal. CPG filed a reply on March 7, and Aegis and the agency filed replies on March 8. [1] We have reviewed the parties' submissions and, for the reasons below, we dismiss the protest.

DISCUSSION

Aegis Lacks Standing to Challenge the WPS 2 IDIQ Contract

Aegis lacks standing to bring a bid protest because, as an awardee, it is not an interested party and any harm alleged is conjectural or hypothetical. Under the Competition in Contracting Act of 1984 (CICA), which governs the bid protest jurisdiction of our Office, only an "interested party" may protest a federal procurement. 31 U.S.C. §3551(1); *Banknote Corp. of Am., Inc. v. United States,* 365 F.3d 1345, 1351–52 (Fed. Cir. 2004); *Nat'l Air Cargo Grp., Inc.,* B–411830.2, Mar. 9, 2016, 2016 CPD ¶__ at 4. CICA defines an interested party as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract[.]" [2] 31 U.S.C. §3551(2)(A). Our Bid Protest Regulations employ the same definition. 4 C.F.R. §21.0(a)(1). Accordingly, to meet the interested party standard under CICA and our Regulations, a protester must (a) be an actual or prospective bidder or offeror, and (b) demonstrate that it possesses a direct economic interest in the contract award. Aegis fails on both counts.

First, Aegis, as an awardee, by definition, is not an actual or prospective offeror. Although prior decisions of our Office have relied primarily on an awardee's lack of direct economic interest to dismiss similar protests, *see e.g., Nat'l Air Cargo Grp., Inc., supra; Recon Optical, Inc.; Lockheed–Martin Corp., Fairchild Sys.,* B–272239, B–272239.2, July 17, 1996, 96–2 CPD ¶21, a protester's status as an awardee precludes its interested party status irrespective of any alleged economic interest. [3] Thus, contrary to Aegis's contentions that no blanket rule applies to bar an awardee from pursuing a bid protest, *see* Aegis Response, Mar. 4, 2016, at 5 (*citing Recon Optical, Inc., supra*), [4] we find that the statutory definition of an interested party expressly bars protests where the protester is the awardee of the challenged contract. [5] Accordingly, Aegis's status as an awardee is alone sufficient to bar its claims.

***3** Second, Aegis fails to establish that it satisfies the second prong of the interested party standard, *i.e.,* that it possesses a direct economic interest in the contract award. When a solicitation contemplates multiple awards, to constitute a cognizable protest, an offeror must credibly allege direct economic harm. *Nat'l Air Cargo Grp., Inc., supra,* at 4–5 (*citing Recon Optical, Inc., supra,* at 3–4). [6] Here, Aegis alleges that it possesses a direct economic interest in that it will be forced to "compete against Chenega–Patriot for task orders under the WPS 2 contract." Protest at 1; Aegis Response at 3. Due to the nature of IDIQ contracts, however, an awardee has no legally cognizable expectation of receiving future task orders. Thus, such economic interest in the issuance of future task orders is too speculative.

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Here, under the RFP's terms, IDIQ contract holders are guaranteed a minimum quantity of orders valued at no less than $10,000 and a fair opportunity to compete for future task orders issued under the IDIQ contract. RFP §§B.3, G.5 (*citing* Federal Acquisition Regulation (FAR) §16.505(b)). In other words, under the instant RFP, the agency is not legally obligated beyond the provision of the guaranteed minimum of $10,000 and a fair opportunity to be considered for future task orders. *Nat'l Air Cargo Grp., Inc., supra,* at 4 ("IDIQ contract holders are guaranteed a minimum quantity of orders ... and a fair opportunity to compete for future task orders[.]"). *See also Automation Techs., Inc. v. United States,* 73 Fed. Cl. 617, 624 (2006) (under an IDIQ contract, an agency is not legally obligated beyond the guaranteed minimum).

Aegis's protest does not allege that the inclusion of CPG will result in Aegis receiving a volume of orders valued less than its guaranteed minimum. In any event, an agency's failure to comply with the contractual requirement to provide the guaranteed minimum is a matter of contract administration, which our Office will not review. 4 C.F.R. §21.5(a). Moreover, to the extent Aegis is alleging that by forcing it to compete with CPG for future task orders, it has been deprived of a fair opportunity to be considered for those task orders, *see* Aegis Response at 6, [7] such a claim is premature for the reasons discussed in the subsequent section.

In light of the fact that Aegis has been awarded a WPS 2 IDIQ contract, it cannot demonstrate a direct economic interest in the contract award to CPG. Indeed, hypothetically, if Aegis's protest were found to be meritorious; and if the agency were to reopen its investigation of the alleged PIA violations; and if CPG's award were terminated on the basis of such alleged violations, Aegis would be unable to obtain an additional stake in the procurement. Rather, it would remain an awardee with the same guaranteed minimum of $10,000 in task orders and a fair opportunity to compete for future task orders. For this reason, Aegis is not an interested party. *The METEC Grp.,* B–290073, B–290073.2, May 20, 2002, 2002 CPD ¶86 at 7 ("A protester is not an interested party to protest an award to another offeror where the protester would not be in line to receive that award were its protest sustained."); *Recon Optical, Inc., supra,* at 3–4 ("Since each protester here is a successful offeror under the RFP each would be unable to obtain any additional stake in this procurement even if its protest of the other award were sustained.").

***4** Aegis's Challenge to Future Task Orders Is Premature

As noted above, Aegis alleges that it possesses an interest in competing for future task orders on a level playing field. Aegis Response at 6. We agree. However, to the extent Aegis contends that the award to CPG deprives it of such an interest or the interest in a fair opportunity to be considered for future task orders, any such contention amounts to a peremptory challenge to a future task order, which is premature at this time. *See Automation Techs., Inc. v. United States, supra,* at 622–23 (construing a complaint regarding the possibility of not being afforded a fair opportunity for future task orders as a protest to the prospective award of the task order itself). Any challenge to a future task order is not ripe for review until, at a minimum, the agency has issued a solicitation for the task order. Aegis cannot allege that it has been deprived of an interest in competing on a level playing field until an actual competition exists.

Moreover, apart from the issue of ripeness, other factors relevant to our review of a challenge to a future task order include, among other things: whether the expected value of the task order exceeds $10 million, *see* 10 U.S.C. §2304c(e)(1)(B); whether Aegis is an actual or prospective offeror in the task order competition; whether CPG intends to submit a proposal in response to a task order solicitation; and whether the agency still maintains that CPG is eligible to compete for task orders. [8] We will not speculate as to such issues at this time. For these reasons, Aegis's challenge to a future, yet-to-be-determined task order competition is premature.

Because we find that Aegis is not an interested party to challenge the WPS 2 IDIQ contract and because we find that any challenge to future task orders is premature, we need not reach a decision with respect to the other grounds for dismissal raised by CPG in its request for dismissal.

We dismiss the protest.

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Susan A. Poling
General Counsel

1 In its reply, the agency indicated that it concurred with CPG's request for dismissal. Agency Reply, Mar. 8, 2016, at 1.

2 Our decision here does not address the meaning of the term "interested party" as it pertains to protests of the conversion of functions performed by Federal employees to private sector performance. *See* 31 U.S.C. §3551(1)(E), (2)(B); *See also* 4 C.F.R. §21.0(a)(2).

3 Although our Office is not bound by decisions of the United States Court of Federal Claims, we note that the court has developed an extensive body of precedent reaching a similar conclusion when construing the term "interested party." *See e.g., Kellogg Brown & Root Servs. v. United States,* 117 Fed. Cl. 764, 768 (2014) (citing "a lengthening line of mostly persuasive precedents holding that contract awardees may not challenge agency decisions regarding their contracts by bringing bid protests.") (citations omitted); *Trailboss Enters., Inc. v. United States,* 111 Fed. Cl. 338, 340 (2013) ("Where the plaintiff is the awardee of the contract, however, it no longer has standing under [28 U.S.C. §1491(b)(1)] as an interested party for the purpose of challenging the terms of the award."); *Outdoor Venture Corp. v. United States,* 100 Fed. Cl. 146, 152 (2011) ("Once a bidder has received a contract, it is no longer an actual or prospective bidder or offeror with regard to the particular procurement. Instead, the bidder has become an awardee, who is not an interested party for purposes of 28 U.S.C. §1491(b)(1) and therefore lacks standing to bring a bid protest to protect its award.") (citations omitted); *ABF Freight Sys., Inc. v. United States,* 55 Fed. Cl. 392, 397 (2003) ("Because plaintiffs ... received contract awards under the solicitation complained of, they are not disappointed bidders and do not have standing to assert this protest."). Although these cases interpret the term "interested party" as it appears in the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104–320, codified at 28 U.S.C. §1491(b)(1), the United States Court of Appeals for the Federal Circuit has held that, because that statute does not define the term, the Court will "construe[] the term 'interested party' in accordance with the CICA definition[.]" *Banknote Corp. of Am., Inc., supra,* at 1351–52. The Court also held that, after reviewing the legislative history of ADRA, "we conclude that Congress intended standing under the ADRA to be limited to disappointed bidders." *Id.* at 1351 (*citing AFGE, AFL–CIO v. United States,* 258 F.3d 1294, 1301–02 (Fed. Cir. 2001)).

4 In *Recon Optical, Inc.,* we alluded to a situation in which an awardee of a multiple award contract might possess the requisite economic interest if (a) the RFP permitted alternative proposals and (b) the awardee's alternate proposal was passed over in favor of an award to another offeror. *Recon Optical, Inc., supra,* at 3. In this hypothetical situation, however, the protester would pursue its challenge as a disappointed offeror advocating on behalf of its non-successful alternate proposal, not as a contract awardee.

5 Our Office has permitted awardees to challenge corrective action that involves the termination or suspension of a contract and the subsequent re-competition of the requirements of that contract. *See e.g., American Warehouse Sys., Inc.,* B–412543, Mar. 1, 2016, 2016 CPD ¶__. In these circumstances, however, an awardee satisfies the first prong of the interested party standard because the challenged corrective action essentially returns the procurement to a pre-award status, *i.e.,* the awardee is now akin to a prospective offeror competing for the contract and is viewed as a former awardee. *See Sys. Application & Techs., Inc. v. United States,* 691 F.3d 1374, 1381–82 (Fed. Cir. 2012). That is not the case here. Aegis does not allege that the agency has terminated or suspended its contract, or that the agency has attempted to re-compete the requirements of that contract.

6 Our decision in *Nat'l Air Cargo Grp., Inc.,* does not stand for the proposition that an awardee under an IDIQ contract meets the statutory definition of an interested party if that awardee can demonstrate direct economic interest. As noted above, a protester must demonstrate that it meets both elements of the statutory definition of interested party.

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7 Aegis contends there is a "key fact that meaningfully distinguishes this matter" from other cases in which our Office or the Court of Federal Claims considered an awardee's status as an interested party, namely that none of the other cases involved the misappropriation of an awardee's trade secrets by another awardee under a multiple award IDIQ contract. Aegis Response at 6. Aegis explains that, even if the other cases stand for the proposition that an awardee under an IDIQ may not rely upon the potential diminution in the value or number of future task orders awarded to it in order to demonstrate interested party status, the situation is "qualitatively different" where an awardee is forced to complete against another awardee that misappropriated its trade secrets. *Id.* Thus, Aegis clarifies that it possesses "not only the interest in preventing the diminution in value of its WPS 2 award, but more importantly [an] interest in not having a competitor use the fruits of Aegis's labor against it." *Id.* Aegis argues that it has been deprived of an interest in competing on a "level playing field." *Id.* Although Aegis does not frame its argument in such terms, we view Aegis to be contending, essentially, that the fair opportunity to compete for future task orders is rendered a "fiction" where a party is forced to compete against an awardee that misappropriated its trade secrets.

8 We also note that Aegis has filed a complaint in the Circuit Court for Fairfax County, Virginia, in which Aegis alleges, among other things, that CPG misappropriated Aegis's trade secrets in connection with the WPS 2 procurement. *See* Protest, Exh. 3, Aegis Complaint, No. FE–2015–09880, at 16–17. As part of its prayer for relief, Aegis seeks "a finding that Chenega–Patriot is disqualified from participating in the WPS 2 solicitation and [is] enjoined from participating in the WPS 2 solicitation." *Id.* ¶E at 18. Both the court's factual findings and any relief granted could potentially affect the agency's conclusions with respect to its PIA investigation, CPG's responsibility, and/or CPG's participation in the WPS 2 procurement.

B- 412755 (Comp.Gen.), 2016 CPD P 98, 2016 WL 1237962

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126 Fed.Cl. 281
United States Court of Federal Claims.

NATIONAL AIR CARGO GROUP, INC., Plaintiff,
v.
UNITED STATES, Defendant,
and
United Air Lines, Inc., Defendant–Intervenor.

No. 16–362C
|
(Filed: April 28, 2016)

Synopsis

Background: Contract awardee filed protest arguing that decision by United States Transportation Command (TRANSCOM) to award six contracts violated limitations on awards in request for proposals (RFPs). United States moved to dismiss. Awardee moved for temporary restraining order or preliminary injunction.

Holdings: The Court of Federal Claims, Lettow, J., held that:

[1] awardee made non-frivolous allegations of statutory or regulatory violation in connection with procurement, as required for Court to have jurisdiction over protest;

[2] awardee was "interested party," as required for claim under Tucker Act; and

[3] awardee did not establish that it was likely to succeed on merits of its protest, and thus Court could not issue preliminary injunction or temporary restraining order.

Motions denied.

Procedural Posture(s): Motion to Dismiss; Motion for Preliminary Injunction.

West Headnotes (21)

[1] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Contract awardee made non-frivolous allegations of statutory or regulatory violation in connection with procurement, as required for Court of Federal Claims to have jurisdiction over protest, where awardee alleged that government ignored limitations in request for proposals regarding procedure for selecting second round of awardees in multiple-award indefinite-delivery-indefinite-quantity (IDIQ) contract, which was contract by which government promises to buy stated minimum and contractor agrees to sell or provide stated maximum, and that such action contravened Competition in Contract Act. 10 U.S.C. § 2305(b)(1); 28 U.S.C.A. § 1491(b)(1); 41 U.S.C.A. § 111; 48 C.F.R. § 15.305; RCFC, Rule 12(b)(1).

2 Cases that cite this headnote

[2] **United States** Claims against United States in general

A court deciding a jurisdictional motion to dismiss must not reach the merits; only after this initial inquiry is completed and the Court of Federal Claims takes jurisdiction over the case does it consider the facts specific to the plaintiff's case to determine whether on the facts the plaintiff's claim falls within the terms of the statutes. RCFC, Rule 12(b)(1).

[3] **United States** Dismissal

When assessing a motion to dismiss for lack of subject matter jurisdiction, a court normally will consider the facts alleged in the complaint to be true and correct. RCFC, Rule 12(b)(1).

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[4] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

The grant of jurisdiction to the Court of Federal Claims to render judgment on an action by an interested party objecting to a solicitation by a federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement covers not only pre-award and post-award bid protests but any alleged violation of law in connection with a procurement; as long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction. 28 U.S.C.A. § 1491(b)(1).

5 Cases that cite this headnote

[5] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

A bid protestor need only make a non-frivolous allegation of a statutory or regulatory violation in connection with a procurement or proposed procurement for Court of Federal Claims to have jurisdiction over a bid protest. 28 U.S.C.A. § 1491(b)(1).

6 Cases that cite this headnote

[6] **Public Contracts** Decisions of Contracting Officers on Contract Disputes

United States Decisions of Contracting Officers on Contract Disputes

When the Contract Disputes Act (CDA) applies, it is exclusive; nonetheless, circumstances can arise where a claim under the CDA properly might be coupled with a bid protest. 41 U.S.C.A. § 7102 et seq.

[7] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

In "deselection" cases, where multiple contractors compete in phases for development of a desired product, preparation of prototypes, and then ultimately production, a decision by the procuring agency to winnow or eliminate candidates by ceasing further orders from one or more of the competing awardees can prompt a bid protest. 28 U.S.C.A. § 1491(b)(1).

[8] **Public Contracts** Decisions of Contracting Officers on Contract Disputes

United States Decisions of Contracting Officers on Contract Disputes

Contract Disputes Act (CDA) claims allege violations of contract rights, and, in contrast, a bid protest claim does not allege violations of contract law, but instead alleges violations of procurement law; that distinction is critical because CDA claims must arise, as a jurisdictional prerequisite, from contractual privity with the government. 28 U.S.C.A. § 1491(b)(1); 48 C.F.R. § 2.101.

2 Cases that cite this headnote

[9] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

Public Contracts Decisions of Contracting Officers on Contract Disputes

United States Rights and Remedies of Disappointed Bidders; Bid Protests

United States Decisions of Contracting Officers on Contract Disputes

A plaintiff as a contract awardee will fail to make a claim within the bid protest jurisdiction of the Court of Federal Claims if the claim is one for breach of its own contract; such a claim would be a Contract Disputes Act (CDA) claim, not a bid protest. 28 U.S.C.A. § 1491(b)(1).

7 Cases that cite this headnote

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[10] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

A party's status as a contract awardee does not, by itself, deprive the Court of Federal Claims of bid protest jurisdiction. 28 U.S.C.A. § 1491(b)(1); 41 U.S.C.A. § 111; 48 C.F.R. §§ 2.101, 15.504.

4 Cases that cite this headnote

[11] **Public Contracts** Parties; standing

United States Parties; standing

Contract awardee was "interested party," as required for claim under Tucker Act that decision by United States Transportation Command (TRANSCOM) to award six contracts violated limitations on awards in request for proposals (RFPs), since awardee did not seek contractual award but instead sought to remedy alleged violation of procurement law that affected task order pool, and awardee alleged that competition for roughly $296 million of task orders available to indefinite-delivery-indefinite-quantity (IDIQ) pool would have affect to its detriment. 28 U.S.C.A. § 1491(b)(1); 31 U.S.C.A. § 3551(2).

3 Cases that cite this headnote

[12] **Public Contracts** Parties; standing

United States Parties; standing

Generally, to prove the existence of a direct economic interest in a typical post-award bid protest under the Tucker Act where the plaintiff is a losing offeror whose bid was rejected and who challenges the government's selection of another offeror as the winner, a party must show that it had a substantial chance of winning the contract. 28 U.S.C.A. § 1491(b)(1); 31 U.S.C.A. § 3551(2).

1 Cases that cite this headnote

[13] **Public Contracts** Parties; standing

United States Parties; standing

A protest, by its nature, will dictate the necessary factors for a "direct economic interest," as required for a claim under the Tucker Act, since not all protestors seek the award of a contract. 28 U.S.C.A. § 1491(b)(1); 31 U.S.C.A. § 3551(2).

3 Cases that cite this headnote

[14] **Injunction** Grounds in general; multiple factors

The party seeking preliminary injunctive relief must establish that (1) it is likely to succeed on the merits; (2) it will suffer irreparable harm if the injunction is not granted; (3) the balance of hardships tips in its favor; and (4) that a preliminary injunction will not be contrary to the public interest. RCFC, Rule 65(a)(1), (b)(1).

[15] **Injunction** Grounds in general; multiple factors

Injunction Grounds in general; multiple factors

No single factor for a preliminary injunction or temporary restraining order is dispositive, but a protestor must establish the first two factors, likelihood of success on the merits and irreparable harm, before a preliminary injunction can be granted. RCFC, Rule 65(a)(1), (b)(1).

[16] **Public Contracts** Scope of review

A court may set aside a procurement action if (1) the procurement official's decision lacked a rational basis, or (2) the procurement procedure involved a violation of regulation or procedure. 5 U.S.C.A. § 706; 28 U.S.C.A. § 1491(b)(4); RCFC, Rule 65(a)(1), (b)(1).

[17] **Public Contracts** Evaluation process

United States Evaluation process

When making a procurement decision, a federal agency must evaluate proposals and make awards based on the criteria stated in the solicitation.

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1 Cases that cite this headnote

[18] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

On judicial review, interpretation of a federal agency's bid solicitation is a question of law. 5 U.S.C.A. § 706; 28 U.S.C.A. § 1491(b)(4).

[19] **Public Contracts** In general; advertising

United States In general; advertising

If the provisions of a bid solicitation by a federal agency are clear and unambiguous, they must be given their plain and ordinary meaning. 5 U.S.C.A. § 706; 28 U.S.C.A. § 1491(b)(4).

[20] **Injunction** Award of contract; bids and bidders

Contract awardee did not establish that it was likely to succeed on merits of its protest, and thus Court of Federal Claims could not issue preliminary injunction or temporary restraining order on protest arguing that decision by United States Transportation Command (TRANSCOM) to award six contracts violated limitations on awards in request for proposals (RFPs); although solicitation was ambiguous, ambiguity likely would be resolved by examining provisions regarding acceptance of offers, and government had reasonable argument that reopening provisions of RFP were not triggered, among other things. 5 U.S.C.A. § 706; 28 U.S.C.A. § 1491(b)(4); RCFC, Rule 65(a)(1), (b)(1).

[21] **Contracts** Lapse of offer

As a general rule, an offeror may define when his or her offer can be accepted.

Attorneys and Law Firms

***284** Milton C. Johns, Fluet, Huber + Hoang, PLLC, Woodbridge, Virginia, for plaintiff.

Aaron E. Woodward, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With him on the briefs were Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Civil Division, Robert E. Kirschman, Director, and Douglas Mickle, Assistant Director, Civil Division, United States Department of Justice, Washington, D.C. Of counsel was Karen L. Tibbals and Peter B. Ries, Acquisition Attorneys, United States Transportation Command, Scott Air Force Base, Illinois, and Lieutenant Colonel Aaron G. Lake, Deputy Chief, Commercial Litigation Field Support Center, United States Air Force, Andrews Air Force Base, Maryland.

David S. Cohen, Cohen Mohr, LLP, Washington, D.C. for defendant-intervenor. With him at the hearing was Daniel J. Strouse, Cohen Mohr, LLP, Washington, D.C.

Bid protest; multiple awards of indefinite-delivery/indefinite-quantity contracts; challenge by one of the awardees to a later award of an additional contract; statutory prerequisites for a bid protest; 28 U.S.C. § 1491(b)(1); standing; dispute over applicability of the Competition in Contracting Act to the later award

OPINION AND ORDER

LETTOW, Judge.

The United States Transportation Command ("TRANSCOM" or "government") awarded five indefinite-delivery/indefinite-quantity contracts in June 2015 for multi-modal international shipping of Department of Defense and other government-approved cargo. Plaintiff National Air Cargo Group, Inc. ("National") was one of the awardees. The following month, the government awarded a sixth contract to United Air Lines, Inc. ("United"). National then submitted protests regarding the sixth award to the Government Accountability Office ("GAO") and this court, resulting in TRANSCOM's agreement to take corrective action to reevaluate past performance for all TRANSCOM offerors. Subsequently, TRANSCOM reaffirmed the awards made to each of the six successful offerors. That action prompted this renewed protest.

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At this juncture, National alleges that the government's decision to award a contract to United violated terms of the solicitation limiting awardees, as well as applicable statutes and regulations, and was also irrational because United lacks past performance history in multi-modal international shipping. Compl. at 1. The government has filed a ***285** motion to dismiss pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC"), arguing that National, as an awardee, lacks standing to protest an award of a contract to another offeror in this multiple-award indefinite-delivery/ indefinite-quantity procurement. Def.'s Mot. to Dismiss ("Def.'s Mot."), ECF No. 11. National has filed a cross-motion for a preliminary injunction and an application for a temporary restraining order pursuant to RCFC 65. Pl.'s Mot. for Injunctive Relief ("Pl.'s Mot."), ECF No. 12. [1] United was granted leave to defend the award. Order of Mar. 24, 2016, ECF No. 10. A hearing was held on April 13, 2016. [2]

1 National also filed a supplemental request for a temporary restraining order, ECF No. 29, after TRANSCOM issued a Request for Quotation pursuant to the indefinite-delivery/ indefinite-quantity contracts. The defendants have filed responses in opposition to this supplemental request. ECF Nos. 30, 31.

2 At the hearing, the court raised jurisdictional precedents that had not been addressed by the parties in their briefing of the competing motions. Immediately thereafter, United filed a Motion for Leave to File Responses to the Court's Inquiries, ECF No. 21. The court granted that motion, Order of Apr. 14, 2016, ECF No. 22, and the parties each submitted supplemental briefs on April 18, 2016, ECF Nos. 26, 27, 28.

FACTS AND BACKGROUND [3]

3 This recitation is drawn from the complaint's allegations, the attached solicitation, and declarations submitted by the parties. The court has found jurisdictional facts with respect to standing. *See Land v. Dollar,* 330 U.S. 731, 735 n. 4, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947) ("[W]hen a question of the [d]istrict court's jurisdiction is raised, ... the court may inquire by affidavits or otherwise, into the facts as they exist."), *overruled by implication on other grounds by Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *see also Cedars–Sinai Med. Ctr. v. Watkins,* 11 F.3d 1573, 1584 (Fed.Cir.1993); *Midwest Tube Fabricators, Inc. v. United States,* 104 Fed.Cl. 568, 574 (2012).

A. *TRANSCOM Requests Proposals for an Indefinite–Quantity Contract for International Shipping Services, Selects Five Contractors for Award, and then Later Makes a Sixth Award*

On February 12, 2015, the government issued a request for proposals ("RFP") for international multi-modal transportation of government cargo. Compl. ¶ 5. [4] The RFP provided that "[t]his is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated." Compl. Ex. 1 (setting out a 90–page excerpt of the RFP) ("RFP") at 9, ECF No. 1–1 to 1–3. [5] An "indefinite-quantity" contract, also known as an indefinite-delivery/ indefinite-quantity ("IDIQ") contract, is a contract by which the government promises to buy a stated minimum and the contractor agrees to sell or provide a stated maximum. 48 C.F.R. ("Federal Acquisition Regulation" or "FAR") § 16.504(a)(1); *see also* John Cibinic, Jr., et al., *Formation of Government Contracts* 1386 (4th ed. 2011). Once an IDIQ contract is awarded, the government issues task or delivery orders to the IDIQ contract holder to fulfill its requirements. In some instances, the government awards one IDIQ contract to one contractor. But in many cases, the government awards multiple IDIQ contracts under one solicitation, thereby creating a pool of contractors who compete with each other for task orders. *See, e.g.,* FAR § 16.504(c)(1)(i) (requiring the contracting officer to "give preference" to making multiple awards); FAR § 16.505(b)(1)(i) (providing that each awardee under a multiple-award contract must have an opportunity to compete for any order exceeding $3,500).

4 Solicitation number HTC711–15–R–R001.

5 All citations are to the page numbers of the 90–page RFP excerpt, not the page numbers assigned to the exhibit by CM/ECF.

The RFP in this instance established that the government would award multiple IDIQ contracts to bidders offering the "best value" to the government, based on four factors: quality of business proposal, technical ability, price, and past performance history. RFP at 87–88. With respect to

past performance, the government would give each offeror a "confidence assessment" of either substantial confidence, satisfactory confidence, limited confidence, or no confidence. RFP at 89. If an offeror had "no recent/relevant performance" of record, then the offeror would receive an "unknown confidence" rating, which ***286** would be "treated neither favorably nor unfavorably." *Id.*

Using this evaluation scale, TRANSCOM advised that it would "award approximately four (4) IDIQ contracts," which would give the government "flexibility of choice and service coverage." RFP at 87. The selection of these winners would "initially establish the awardee pool." RFP at 52. This pool of awardees would then compete for task orders issued by TRANSCOM. *Id.*

Pursuant to FAR § 16.504(a)(1), which requires a minimum task order for each winner, the RFP provided that the government would purchase a minimum of $2,500 of international shipping services from each awardee. RFP at 4. The solicitation set the maximum total dollar amount for all task orders at $296,448,852.21. *Id.* In essence, each winner thus would compete for up to $296 million in task orders.

The RFP set out a condition bearing on additional awards. In certain circumstances, the RFP permitted the government to "reopen" the competition to add additional contractors to the pool:

> **1. Recompetition**
>
> 1.1 The Government will initially establish the awardee pool by competitively awarding multiple-award IDIQ contracts. *As future task order requirements within the program ceiling totals materialize, over the life cycle of this program, the Government will compete those requirements amongst all existing IDIQ contract holders to determine if the contract holders can adequately fulfill the needed capability. The Government reserves the right to reopen the competition under this solicitation if there is [a] shortfall in meeting the requirements among the existing IDIQ contract holders or if it is in the Government's best interest to add new contractors to the original pool of IDIQ contract holders.* When/if the Government decides to reopen the solicitation, an announcement will be posted via FedBizOps allowing new ... offerors the opportunity to compete in a full and open competition for an IDIQ contract and task orders to meet the new requirements. Any existing IDIQ contract holder will not re-compete for an IDIQ contract. The competitions will use the same evaluation methodology and documentation (updated to reflect changes in regulatory provisions, requirements and certifications) as the original competition.

RFP at 52. After adding new contractors to the IDIQ pool, the government would continue soliciting task orders from the expanded pool: "Once a new awardee(s) is selected, that awardee(s) will be included in the awardee pool and will compete for future task orders. Subsequent to a reopened competition, initial and new IDIQ awardees can compete for future task orders." *Id*.

The RFP required offerors to submit proposals by March 16, 2015. RFP at 1. Submissions by this deadline would trigger a 180–day "[p]eriod of acceptance of offers," during which time each offeror "agrees to hold the prices in its offer firm." RFP at 86. In response to the RFP, National submitted a bid. Compl. ¶ 9. On June 11, 2015, the government awarded IDIQ contracts to National and four other bidders. Compl. ¶ 9. [6] On July 17, 2015, however, the government announced a sixth award, this time to United. Compl. ¶ 10. The five initial awardees had no notice of a possible additional award, nor did TRANSCOM reopen the competition under the RFP's terms. Compl. ¶ 10. National alleges that this action by TRANSCOM violated the Competition in Contracting Act, codified as amended in part in scattered sections of Title 41 of the United States Code, especially 41 U.S.C. §§ 1708, 3701–08. *See* Compl. at 1. National also asserts that the award was irrational because United has no experience in the type of "multi-modal" shipping services required by the RFP. *See* Compl. ¶¶ 51–57.

6 The defendants dispute whether National is an "actual" bidder as a matter of law. *E.g.,* Def.'s Mot. at 4. But as a matter of fact, National submitted a bid and won a contract. That a contractual award was made pursuant to National's bid does not elide or render ineffective National's action in submitting a bid.

National and the government agree that United will be "a significant source of competition at the task order level," and United does not oppose that characterization. Def.'s ***287** Opp'n to Pl.'s Mot. for a Prelim. Inj. ("Def.'s Opp'n") at 9, ECF No. 15; Pl.'s Reply to Def.'s Opp'n ("Pl.'s Reply") at 3, ECF No. 20; Def.–Interv.'s Support of Mot. to Dismiss and Resp. to Mot. for Prelim. Inj. ("Def.–Interv.'s Resp."), ECF No. 13 (not disputing that assertion). [7]

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[7] The government's brief in opposition to plaintiff's request for an injunction cites United's website to support a proposed finding that "[t]he award to United would allow the [g]overnment access to a worldwide corporation that possesses over 700 mainline aircraft and conducts over 5,000 flights every day to six continents." Def.'s Opp'n at 9 n.2 (citing http://ir.united.com/company-information/company-overview).

B. *National Files a Series of Protests Challenging the Government's Award to United*

National filed a bid protest with GAO on July 27, 2015, arguing that TRANSCOM's decision to award six contracts violated the RFP's limitations on awards. Compl. Ex. 3 ("First GAO Protest") at 4–5. National argued the five initial awardees constituted the "original pool" under the RFP, meaning that the government could not award any further contracts unless and until it complied with the RFP's reopening provisions. First GAO Protest at 5. Because the government had not found a "shortfall" in meeting its requirements within the existing five-contractor IDIQ pool, National contended that the task order pool could not be reopened. *Id.* at 4–5. National also argued that United lacked past performance history in "multi-modal" transportation, making the government's award decision irrational. *Id.* at 5. On September 24, 2015, GAO summarily dismissed the protest, citing GAO policy: "we generally will not review a protest that has the purpose or effect of reducing competition to the benefit of the protestor." Compl. Ex. 4 at 2 (*National Air Cargo Grp., Inc.,* B–411830 (Comp. Gen. Sept. 24, 2015) ("First GAO Decision")). Accordingly, GAO would "not consider the merits of the protester's allegations, which, in essence, seek to limit the agency's discretion to increase the pool of competition among the IDIQ contract holders." First GAO Decision at 2.

Not satisfied with this result, National filed a protest in this court on October 13, 2015 alleging the same errors that it asserted in its GAO protest. Compl., *National Air Cargo Grp., Inc. v. United States,* No. 15–1191 (Fed.Cl. Oct. 13, 2015). In response, the government decided to take corrective action, informing the court that it would be "re-evaluating all offerors' past performance," "conducting limited discussions (if needed) with the offerors concerning their past performance," and "making a new award decision." Def.'s Notice of Corrective Action and Mot. to Stay Briefing at 1, *National Air Cargo Grp., Inc. v. United States,* No. 15–1191 (Fed.Cl. Oct. 19, 2015). The government then filed a motion to dismiss the complaint as moot, which National did not oppose and which the court granted. Order of Dismissal, *National Air Cargo Grp., Inc. v. United States,* No. 15–1191 (Fed.Cl. Nov. 30, 2015). On January 21, 2016, TRANSCOM completed its corrective action and announced that it would again make six awards, including awards to National and United. Compl. Ex. 6.

National again protested this decision, filing with GAO on January 27, 2016 and alleging the same errors as in its prior protests. Compl. Ex. 7. Again, GAO dismissed the protest. Compl. Ex. 8 (*National Air Cargo Grp., Inc.,* B–411830.2, 2016 WL 1055743 (Comp. Gen. Mar. 9, 2016) ("Second GAO Decision")). Unlike GAO's first decision, which dismissed the protest on the policy ground that GAO would not hear protests to decrease competition, the second GAO decision dismissed National's protest for failing to satisfy the standing requirements of 4 C.F.R. § 21.0(a)(1), which provides that "a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract." Second GAO Decision at 4. Without analyzing the specific text of this definitional regulation, GAO summarily concluded that a "protester is not an interested party where it would not be in line for contract award were its protest to be sustained." *Id.* Because GAO found that National was "an existing contract awardee" of an IDIQ contract, it ***288** concluded National was "not an interested party" and dismissed the case. *Id.*

Not deterred by GAO's second dismissal, National filed a protest again in this court on March 21, 2016, making the same allegations as in its prior complaint. On March 22, 2016, the court held an initial status conference and set an expedited schedule by which the government would file a motion to dismiss for lack of standing and simultaneously National would request a temporary restraining order or preliminary injunction. Order of Mar. 22, 2016, ECF No. 8. At that time, the parties reported that the government would begin issuing task orders to the IDIQ pool on April 1, 2016. Scheduling Conf. Tr. 9:1–3 (Mar. 22, 2016), ECF No. 17 ("The [g]overnment has lifted the stop work order, and has advised the contractors that task orders will be competed ... beginning April 1.").

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JURISDICTION

A. *Standard for Decision Under RCFC 12(b)(1)*

[1] **[2]** The government's motion to dismiss under RCFC 12(b)(1) focuses on a contention that National lacks standing to pursue its protest. A court deciding a jurisdictional motion to dismiss must not reach the merits. *Engage Learning, Inc. v. Salazar,* 660 F.3d 1346, 1355 (Fed.Cir.2011). "Only after this initial inquiry is completed and the Court of Federal Claims takes jurisdiction over the case does it consider the facts specific to the plaintiff's case to determine 'whether on the facts [the plaintiff's] claim f[alls] within the terms of the statutes.' " *Greenlee Cnty. v. United States,* 487 F.3d 871, 876 (Fed.Cir.2007) (quoting *Fisher v. United States,* 402 F.3d 1167, 1172 (Fed.Cir.2005)); *see also Association of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (rejecting a standing test used by a lower court because that "test goes to the merits. The question of standing is different."); *Amador Cnty. v. Salazar,* 640 F.3d 373, 378 (D.C.Cir.2011) ("[F]or the purposes of standing, 'we assume the merits' in favor of the plaintiff." (quoting *Parker v. District of Columbia,* 478 F.3d 370, 377–78 (D.C.Cir.2007))); *Distributed Solutions, Inc. v. United States,* 539 F.3d 1340, 1345 & n. 1 (Fed.Cir.2008) ("A non-frivolous allegation of a statutory or regulatory violation in connection with a procurement or proposed procurement is sufficient to establish jurisdiction.").

[3] When assessing a motion to dismiss under RCFC 12(b)(1), the court will "normally consider the facts alleged in the complaint to be true and correct." *Reynolds v. Army & Air Force Exch. Serv.,* 846 F.2d 746, 747 (Fed.Cir.1988). "A plaintiff bears the burden of establishing subject-matter jurisdiction by a preponderance of the evidence." *M. Maropakis Carpentry, Inc. v. United States,* 609 F.3d 1323, 1327 (Fed.Cir.2010). If the court at any time determines that it lacks jurisdiction, it must dismiss the case. RCFC 12(h)(3).

B. *Statutory Prerequisites for Bid Protest Jurisdiction Under Paragraph 1491(b)(1)*

To exercise jurisdiction over a bid protest under the Tucker Act, as amended by the Administrative Dispute Resolution Act, Pub.L. No. 104–320, § 12, 110 Stat. 3870, 3874 (Oct. 19, 1996) (adding new 28 U.S.C. § 1491(b)(1)), the court must make two determinations. First, it must address whether the protestor is objecting to a solicitation, proposed award, award, or violation of law "in connection with a procurement ***289** or a proposed procurement." 28 U.S.C. § 1491(b)(1). Second, the court must determine that the protestor has standing as an "interested party." *Id.* These questions must be addressed in this order—first statutory jurisdiction, then standing—because the considerations pertinent to standing depend upon the nature of the protest. *See infra,* at 291–93.

1. Alleged violation of law "in connection with a procurement."

[4] The court has "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a [f]ederal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). This grant of jurisdiction covers not only "pre- and post-award bid protests" but any alleged violation of law "in connection with" a procurement. *RAMCOR Servs. Grp., Inc. v. United States,* 185 F.3d 1286, 1288–89 (Fed.Cir.1999). The latter provision is "very sweeping in scope. As long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction." *Id.* at 1289.

[5] Moreover, the term "procurement" is itself broad, meaning "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 U.S.C. § 111 (defining "procurement"); *Distributed Solutions,* 539 F.3d at 1345 (relying upon this statutory definition of "procurement" to analyze protest jurisdiction); *see also Palladian Partners, Inc. v. United States,* 783 F.3d 1243, 1254 (Fed.Cir.2015) (same). Owing to these definitions, courts construe Paragraph 1491(b)(1) as conferring jurisdiction on this court in a wide variety of cases connected to a procurement, even in cases where the protestor does not seek the award of a contract. *See, e.g., Distributed Solutions,* 539 F.3d at 1345–46 (taking jurisdiction over a contractor's challenge to the government's internal decisions about its needs and market research); *RAMCOR,* 185 F.3d at 1289 (upholding jurisdiction where a plaintiff sought to stop an agency from overriding the automatic stay triggered by a GAO protest); *URS Fed. Servs., Inc. v. United States,* 102 Fed.Cl. 664, 669–70 (2011) (same). To come within the latter prong of Paragraph 1491(b)(1), a protestor need only make a "non-frivolous allegation of a statutory or regulatory violation

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in connection with a procurement or proposed procurement." *Distributed Solutions,* 539 F.3d at 1345 n.1.

Applying these principles here, National alleges that the government ignored limitations in the RFP regarding the procedure for selecting a second round of awardees in this multiple-award IDIQ procurement, Compl. ¶¶ 44–45, and that this action contravened the Competition in Contract Act, Compl. at 1. These allegations are directed at a "procurement," because they allege illegality in the selection of awardees. 41 U.S.C. § 111 (defining procurement as "all stages of the process of acquiring property or services"). Allegations that the government violated the solicitation also implicate core procurement rules such as FAR § 15.305(a), which requires the agency to "assess" bidders "solely on the factors and subfactors specified in the solicitation." *See also* 10 U.S.C. § 2305(b)(1) (same). National's complaint thus makes non-frivolous allegations of a statutory or regulatory violation in connection with a procurement.

[6] **[7]** Despite this, the defendants argue that National cannot pursue a bid protest under Paragraph 1491(b)(1) because in their view contract awardees are categorically barred from filing bid protests. Hr'g Tr. 22:1–13, 35:13–18 (Apr. 13, 2016), ECF No. 25; Def.'s Mot. at 4. To support this argument, the defendants cite several cases holding that claims by an existing contractor on its contract are "contract administration" claims, which are within the exclusive remedial scheme of the Contract Disputes Act ("CDA"), codified as amended at 41 U.S.C. §§ 7102–09. Def.'s Mot. at 4 (citing *Trailboss Enter., Inc. v. United States,* 111 Fed.Cl. 338, 340 (2013); *TigerSwan, Inc. v. United States,* 110 Fed.Cl. 336, 347–48 (2013); *Outdoor Venture Corp. v. United States,* 100 Fed.Cl. 146, 152 (2011)). Well-established precedents hold that when the CDA applies, it is exclusive. *Dalton v. Sherwood Van Lines, Inc.,* 50 F.3d 1014, 1017 (Fed.Cir.1995) ("When the [CDA] applies, it provides the exclusive mechanism for dispute resolution."). Nonetheless, circumstances can arise where a claim under the CDA might properly be coupled with a bid protest. *See, e.g., Montana Fish, Wildlife, & Parks Found., Inc. v. United States,* 91 Fed.Cl. 434 (2010) (addressing the government's attempt to terminate a trustee in alleged breach of a trust agreement, accompanied by a solicitation for bids for a successor trustee). Additionally, in "deselection" cases, where multiple contractors compete in phases for development of a desired product, preparation of prototypes, and then ultimately production, a decision by the procuring agency to winnow or ***290** eliminate candidates by ceasing further orders from one or more of the competing awardees can prompt a protest under Paragraph 1491(b)(1). *See, e.g., OTI Am., Inc. v. United States,* 68 Fed.Cl. 108, 113–17 (2005). These examples demonstrate that defendants' argument—that contract awardees may not file bid protests—is not always true, even though it might often be correct. In sum, defendants' categorical argument reaches too broadly.

Indeed, the Federal Circuit has already rejected defendants' contention that contract awardees are barred from filing bid protests. In *Systems Application & Techs., Inc. v. United States,* 691 F.3d 1374, 1381 (Fed.Cir.2012), the Army awarded a contract to the plaintiff, SA–TECH, but then announced it would revoke the award in contemplation of a resolicitation after GAO unofficially opined that the Army's award to SA–TECH was unlawful. *Id.* at 1379. SA–TECH then filed suit in this court, contending that the Army's corrective action violated FAR § 15.504 and was irrational. *Id.* at 1380. On these facts, the government argued that SA–TECH could not protest because it was an awardee. *Id.* at 1381–82. As an awardee, the government insisted that SA–TECH had to proceed under the CDA. *Id.* The court of appeals rejected this argument in jurisdictional terms as follows: "[i]n this case, the Army had not yet implemented corrective action. Moreover, SA–TECH *was the contract awardee*. Neither of these facts are material to the question of jurisdiction." *Id.* at 1381 (emphasis added). [8]

8 *Systems Application* is expressly not limited to corrective action cases, because the opinion says the fact that "the Army had not yet implemented corrective action" is not "material to the question of jurisdiction." If the Army *had* implemented the corrective action, then the case would no longer be a corrective-action case—it would instead be a regular pre-award bid protest. Thus the court's comment shows that the corrective-action context is immaterial to its jurisdictional analysis in terms of whether the plaintiff had alleged violations of procurement law, as opposed to CDA claims. Although one court has impliedly suggested that *Systems Application* is limited to corrective-action challenges, *Trailboss,* 111 Fed.Cl. at 341 n. 4, that submonition misapprehends the scope of *Systems Application*.

Instead, the court of appeals cited the statutory definition of a "procurement" in 41 U.S.C. § 111 and asked whether SA–TECH had made an objection to a procurement. *Systems*

Application, 691 F.3d at 1381. It then found that the plaintiff had alleged "violations of statutes and regulations governing the procurement process" regarding contract award as a stand-alone "basis for jurisdiction." *Id.* (citing *Systems Application & Techs. v. United States,* 100 Fed.Cl. 687, 719 (2011) (concluding that plaintiff successfully proved its allegation that the government violated FAR § 15.504, which governs the award process, among other statutes and regulations)). The plaintiff had also objected to a solicitation, which objection provided a separate basis for jurisdiction. *Id.* The court of appeals further noted that, although claims subject to the CDA are exclusive to the CDA, it is not correct that a contract awardee's claims are necessarily CDA claims. Thus "SA–TECH's attempt to enjoin the government from terminating its contract did not transform its otherwise proper protest under the Tucker Act into a claim which could only be adjudicated under the Contract Disputes Act and its concomitant procedural requirements." *Id.* at 1381.

[8] This commentary in *Systems Application* on the CDA properly distinguishes between a CDA claim and a bid protest claim. A CDA claim is an "assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief *arising under or relating to the contract*." *Todd Constr., L.P. v. United States,* 656 F.3d 1306, 1311 (Fed.Cir.2011) (quoting FAR § 2.101) (emphasis added). CDA claims thus allege violations of contract rights. In contrast, a bid protest claim does not allege violations of contract law, but instead alleges violations of procurement law. *See Ingersoll–Rand Co. v. United States,* 780 F.2d 74, 77–78 (D.C.Cir.1985) (holding that a claim is a CDA claim, and not a bid protest claim, when the "source of the right at stake" is one that "sounds genuinely in contract") (quoting *Megapulse, Inc. v. Lewis,* 672 F.2d 959, 967 (D.C.Cir.1982)). *Compare* ***291** *SRS Techs. v. United States,* 843 F.Supp. 740, 742–43 (D.D.C.1994) (holding claim was a bid protest, not a CDA claim, because plaintiff did not allege violations of its contractual rights), *and K–LAK Corp. v. United States,* 93 Fed.Cl. 749, 753–54 (2010) (same), *with Information Sys. & Networks Corp. v. Department of Health & Human Servs.,* 970 F.Supp. 1, 4 (D.D.C.1997) (holding claim was a CDA claim, not a bid protest, because plaintiff alleged violations of contractual rights). *See also Griffy's Landscape Maint., LLC v. United States,* 51 Fed.Cl. 667, 672 (2001) ("The government reads 28 U.S.C. § 1491(b)(1) more absolutely than we would. There may be circumstances where a *successful* bidder would have a direct economic interest that is affected by the award of the contract.") (emphasis in original). That distinction is critical because CDA claims must arise, as a jurisdictional prerequisite, from contractual privity with the government. *United States v. Johnson Controls, Inc.,* 713 F.2d 1541, 1550–51 (Fed.Cir.1983); *Walsky Constr. Co.,* ASBCA No. 52772, 01–2 BCA ¶ 31557, 2001 WL 902117 (Aug. 6, 2001) (when plaintiff is both a subcontractor-not-in-privity and a prime contractor-in-privity with the United States, only its claims arising from contractual privity fall within CDA). In *Systems Application,* the plaintiff challenged a violation of statute and regulation regarding an award decision and solicitation, not a breach of its own contractual rights. Thus its claim was not a CDA claim.

The precedents cited by the government are not to the contrary. In each of the cases cited by the government, the court found the plaintiffs alleged a claim subject to the CDA, meaning a claim arising from plaintiffs' own contract rights. *Trailboss,* 111 Fed.Cl. at 340 (ruling where plaintiff sought, in essence, a declaratory judgment that it had not breached its contract by refusing to honor the prices it quoted in its bid); *TigerSwan,* 110 Fed.Cl. at 348 (addressing plaintiff's challenge to the termination of its contract for convenience); *Outdoor Venture,* 100 Fed.Cl. at 152 (same); *see also Kellogg Brown & Root Servs., Inc. v. United States,* 117 Fed.Cl. 764, 768 (2014) (characterizing these as cases "holding that contract awardees may not challenge agency decisions regarding *their contracts* by bringing bid protests.") (emphasis added).

[9] **[10]** In summary, a plaintiff as a contract awardee will fail to make a claim within this court's bid protest jurisdiction under Paragraph 1491(b)(1) if the claim is one for breach of its own contract. Such a claim would be a CDA claim, not a bid protest. *Coast Prof'l, Inc. v. United States,* 120 Fed.Cl. 727, 734–36 (2015), *appeals docketed,* Nos. 15–5077, 15–5101 (Fed.Cir.). Here, National alleges violations of procurement law in selecting awardees, not violations of rights arising out of its contract with TRANSCOM, so its claims cannot arise under the CDA. Like the protestor in *Systems Application,* its status as a contract awardee does not, by itself, deprive this court of bid protest jurisdiction under Paragraph 1491(b)(1).

2. An "interested party" pursuant to Paragraph 1491(b)(1).

[11] To pursue a bid protest in this court, the plaintiff must also be an "interested party." 28 U.S.C. § 1491(b)(1). The defendants argue that National is not "interested" because it already has an IDIQ contract, and because its injury is in the form of increased competition in the task-order pool. Def.'s

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Mot. at 4–5; Def.–Interv.'s Resp. at 2–3. GAO, which likewise permits protests only by an "interested party," dismissed National's case on this basis, stating that a "protester is not an interested party where it would not be in line for contract award were its protest to be sustained." Second GAO Decision, at 4.

[12] The Tucker Act does not define the term "interested party," but in 2001 the Federal Circuit held that it should be defined by reference to the Competition in Contracting Act, 31 U.S.C. § 3551(2), which states that an "interested party" is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." *American Fed. of Gov't Emps., AFL–CIO v. United States,* 258 F.3d 1294, 1302 (Fed.Cir.2001). The "direct economic interest" element has since been frequently litigated. In a typical post-award bid protest, the plaintiff is a losing offeror whose bid ***292** was rejected and who challenges the government's selection of another offeror as the winner. *E.g., Information Tech. & Applications Corp. v. United States,* 316 F.3d 1312, 1319 (Fed.Cir.2003). "Generally" in such cases, "to prove the existence of a direct economic interest, a party must show that it had a 'substantial chance' of winning the contract." *Orion Tech., Inc. v. United States,* 704 F.3d 1344, 1348 (Fed.Cir.2013).

[13] Nonetheless, in *Weeks Marine, Inc. v. United States,* the Federal Circuit instructs that the "substantial chance" test is not the only criterion for determining whether a plaintiff has a direct economic interest. 575 F.3d 1352, 1361–62 (Fed.Cir.2009). Rather, "[a] protest will, by its nature, dictate the necessary factors for a 'direct economic interest.' " *Systems Application,* 691 F.3d at 1382 (citing *Weeks Marine,* 575 F.3d at 1361–62). This precept recognizes that not all protestors seek the award of a contract. *E.g., Navarro Research & Eng'g, Inc. v. United States,* 94 Fed.Cl. 224, 229 (2010) (applying *Weeks Marine* when a losing offeror filed suit seeking a debriefing, rather than seeking award of a contract).

Factually, *Weeks Marine* was a situation in which the Army Corps of Engineers had for years solicited dredging services using sealed bidding procedures. *Weeks Marine,* 575 F.3d at 1355. The plaintiff, Weeks Marine, had previously won dredging contracts under that procurement method. *Id.* at 1356. The government then decided to stop using sealed bidding and instead proceed with negotiated bidding for IDIQ contracts. *Id.* at 1355. Before any bids were submitted, Weeks Marine filed suit, alleging that the government violated statutes that, in its view, required sealed bidding under the circumstances. *Id.* at 1356 (citing 10 U.S.C. § 2304(a)(2)(A)). The government responded that Weeks Marine lacked standing because (1) its injury was "borne equally by all bidders," (2) its "allegations simply amount to a critique of IDIQ contracts in general," and (3) Weeks Marine could not prove it had a substantial chance of winning a contract. *Id.* at 1360. It had no substantial chance, the government said, because no bids had been submitted and so it was unknown who had a chance of succeeding. *Id.*

The court of appeals rejected that argument by the government. It began its analysis with the proposition that the protestor must be an "actual or prospective bidder" who "possess[es] the requisite direct economic interest." *Id.* at 1359 (quoting *Rex Serv. Corp. v. United States,* 448 F.3d 1305, 1308 (Fed.Cir.2006)). Because the "actual or prospective bidder" prong was undisputed, the court focused only on direct economic interest. On the facts, the court observed that no bids had been filed. It thus held that the context of the case presented "no factual foundation for a 'but for' prejudice analysis" as contemplated by the "substantial chance" test, making that test inapposite. *Id.* at 1361.

The court then reasoned that a one-size-fits-all "substantial chance" test for economic interest would be inconsistent with the broad language of Paragraph 1491(b)(1), "which contemplates 'an action by an interested party objecting to a solicitation for bids or proposals ... or any alleged violation of statute or regulation in connection with a procurement.' " *Weeks Marine,* 575 F.3d at 1362. Because of the different context, the court held that a plaintiff in such cases must instead demonstrate "a non-trivial competitive injury which can be redressed by judicial relief." *Id.* (quoting *WinStar Commc'ns, Inc. v. United States,* 41 Fed.Cl. 748, 763 (1998)). This test "strikes the appropriate balance" between the language of the statute and constitutional Article III standing requirements. *Id.*; *see also id.* at 1359 (finding Paragraph 1491(b)(1) imposes more "stringent" requirements than Article III). The court of appeals then held that Weeks Marine had alleged a non-trivial competitive injury on the basis of the government's decision to stop using sealed bids for regular contracts and instead use negotiated IDIQ contracts: "Under the IDIQ task order solicitation, however, Weeks would only be guaranteed a minimum of $2,500 and [the government] could deny Weeks all task orders for the next five years without any explanation or discussions, or any ability for Weeks to seek bid protest review. This non-trivial

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***293** competitive injury is capable of being redressed by this [c]ourt." *Id.* at 1362.

After the decision in *Weeks Marine,* the Federal Circuit and this court have declined to inexorably apply the "substantial chance" test when analyzing economic interest. Rather, the courts ask whether the context of a case presents a "factual foundation" for a "substantial chance" analysis. For example, the court of appeals in *Systems Application* explicitly reaffirmed this principle, holding that "[a] protest will, by its nature, dictate the necessary factors for a 'direct economic interest.' " *Systems Application,* 691 F.3d at 1382 (citing *Weeks Marine,* 575 F.3d at 1361–62). The court found that the case was factually akin to a pre-award protest and consequently applied the "non-trivial competitive injury" test, finding plaintiff would suffer such an injury if it was forced to recompete for a contract it had already won. *Id.* at 1382–83.

This principle was further affirmed in *Orion Technology,* 704 F.3d at 1349. In that case, a plaintiff's bid was disqualified prior to award because it failed to include proprietary cost information, as required by the RFP. *Id.* at 1346–47. Citing *Weeks Marine,* the Federal Circuit analyzed whether there was a "sufficient factual predicate" for the substantial chance test. *Id.* at 1348–49 (citing *Weeks Marine,* 575 F.3d at 1361). "Given the circumstances," which included the fact that plaintiff had drafted a bid, the Federal Circuit found that "there is an adequate factual predicate to ascertain under the traditional 'substantial chance' standard whether Orion was prejudiced by the [government's] decision to exclude its initial proposal." *Id.* at 1349.

The defendants argue that *Weeks Marine, Systems Application,* and *Orion Technology* are distinguishable because they are, or are similar to, "pre-award" protests, meaning that the protestors in these cases challenged government action prior to the announcement of a winner. Def.'s Suppl. Br. at 5, ECF No. 26; Def.–Interv.'s Suppl. Br. at 4, ECF No. 27. Although the facts of *Weeks Marine* were pre-award, the holding is not so limited. The operative language said "there is no factual foundation for a 'but for' prejudice analysis." *Weeks Marine,* 575 F.3d at 1361. Nor did *Systems Application* limit its holding to pre-award cases. Instead, the *Systems Application* court stated broadly that: "[a] protest will, by its nature, dictate the necessary factors for a 'direct economic interest.' " *Systems Application,* 691 F.3d at 1382. It did not say that is true "only" in pre-award protests. *Id.* In any event, *Systems Application* was not a typical "pre-award" case, because the protestor was a contract awardee. Nor did *Orion Technology* limit its holding to pre-award cases. There, the court said that the substantial chance test "generally" governed. *Orion Technology,* 704 F.3d at 1348. The court then stated that "an exception"—not *the* exception—is "when a prospective bidder challenges the terms of the solicitation itself, prior to actually submitting a bid." *Id.*

Moreover, decisions by this court have applied *Weeks Marine* 's economic interest test outside the pre-award context. For example, in *Navarro,* the plaintiff bid for a contract but lost to another bidder. 94 Fed.Cl. at 226. Although procurement statutes allegedly required the agency to debrief the plaintiff, the agency refused to provide a debriefing, so Navarro filed suit. *Id.* at 227. In response, the government moved to dismiss for lack of standing. *Id.* at 228. The court's opinion explained that "Navarro is not challenging the procurement decision itself but rather seeks to enforce a post-award procedural remedy—an allegedly mandatory debriefing. In other words, even if Navarro were to prevail here, it would not be awarded the contract." *Id.* at 229. Because Navarro could not be awarded a contract, the government argued that Navarro had "no direct economic interest." *Id.* But the *Navarro* court disagreed. That Navarro would not be awarded the contract if it prevailed in its suit did not mean Navarro was disinterested. Instead, the factual predicate made the "substantial chance" test inapposite, leading *Navarro* to apply the *Weeks Marine* test for standing. *Id.* at 229–30.

Many protestors do not ultimately seek the award of a contract, but they wish instead to vindicate some other economic interest within this court's jurisdiction. That is true especially ***294** for protests that are pre-award or "in connection with a procurement." For instance, in *RAMCOR,* 185 F.3d at 1288–89, the protestor could have at most won an injunction requiring the agency to comply with the automatic stay provided by the Competition in Contracting Act; it would not be in line for contract award as a result of its suit. Similarly, a contract awardee in a multiple-award IDIQ pool has an economic interest in stopping the government from stepping outside stated procurement terms in making further awards. *See Magnum Opus Techs., Inc. v. United States,* 94 Fed.Cl. 512, 530 (2010) (protesting the Air Force's non-competitive exercise of options for only four of six holders of IDIQ contracts and contending that the Air Force was required to hold a new competition for the work at issue), *mot. to amend denied,* 94 Fed.Cl. 553. In the same vein, a contract awardee has an economic interest in protesting the government's action to in-source work, rather than exercising options on the awardee's contract. *Elmendorf Support Servs.*

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J.V. v. United States, 105 Fed.Cl. 203, 208 (2012) (concluding that a challenge to an in-sourcing action was "in connection with a procurement"). And, as in *Systems Application,* an awardee may have an economic interest in halting agency corrective action. *Wildflower Int'l., Ltd. v. United States,* 105 Fed.Cl. 362, 383–85 (2012) (pre-award, or "in connection with").

The court is unpersuaded by the defendants' arguments based upon *Automation Techs., Inc. v. United States,* 73 Fed.Cl. 617, 625 (2006), and *ABF Freight System, Inc. v. United States,* 55 Fed.Cl. 392, 397 (2003). The defendants assert that *Automation* shows that an IDIQ contract holder cannot challenge an award to another IDIQ contract holder under the same solicitation. Def.'s Mot. at 5; Def.–Interv.'s Resp. at 4. In that case, the solicitation stated that the government sought to award one single-award IDIQ contract for computer services. *Automation,* 73 Fed.Cl. at 621 (finding that the contracting officer contemplated a single contract). The contract gave the holder a right to receive a minimum task order of $2,500 and maximum task orders worth millions of dollars. *Id.* at 623. The government awarded a single IDIQ contract to the protestor. A losing offeror then protested to GAO, which prompted the agency to take corrective action in which it elected to make a second IDIQ award, this time to the losing offeror. *Id.* The original winner then filed a protest in this court. The protestor in *Automation* did not argue that the government had illegally added a contractor to a multiple-award task order pool; the protestor instead argued that the government's corrective action had, in effect, revoked its award and made a new award to the losing offeror. *Id.* at 619. On these facts, the court in *Automation* first appeared to address the merits, stating that there was no "statutory or regulatory prohibition from making multiple ID/IQ contracts." *Id.* at 623. Next, the court held that the plaintiff lacked standing because even if it won, it was not guaranteed task orders beyond the $2,500 minimum obligation in its contract. *Id.* at 624.

The decision in *Automation* is unavailing for three reasons. First, that case was decided in 2006, prior to the Federal Circuit's decision in *Weeks Marine*. The court in *Automation* believed it had to apply the "substantial chance" test. *Automation,* 73 Fed.Cl. at 621. Now, however, Federal Circuit precedent shows that the "substantial chance" test does not apply to every bid protest. *Weeks Marine,* 575 F.3d at 1361. Second, the plaintiff in *Automation* did not allege an illegal increase in the task order pool, but instead asserted that the government's decision to award a contract to its opponent had the effect of revoking the original award to the protestor. *Automation,* 73 Fed.Cl. at 619 ("[Protestor] responds that the agency's award of a contract to [the other contractor] effectively eliminates any chance of [its] receiving further delivery orders under its contract."). [9] Here, National alleges the government illegally increased the size of the IDIQ pool without applying the recompetition ***295** provisions of the RFP, causing competitive harm. Third, *Automation* may not be a jurisdictional decision, because it appears to decide the merits of the case by concluding that the statutes did not bar the government's action, *id.* at 623, rather than focusing first on jurisdiction and standing, *see Engage Learning,* 660 F.3d at 1355.

9 Notably, the contracts in *Automation* did not include a clause providing procedures for competing task orders. *See Digital Techs., Inc. v. United States,* 89 Fed.Cl. 711, 714 (2009) (recounting facts of *Automation* in a subsequent breach-of-contract action by one of the parties to a contract).

For similar reasons, the court is not convinced by the government's citation to *ABF Freight,* 55 Fed.Cl. at 397. In that case, decided in 2003, essentially all of the bidders on a contract—awardees and losers—challenged the government's changes to the language of the solicitation, which changes occurred prior to the announcement of awards. *Id.* There, the defendant did not raise the issue of the awardees' standing to protest, yet the court *sua sponte* found that the awardees lacked standing to challenge the language of the solicitation post-award. *Id.* Although the court in *ABF Freight* stated its conclusion in terms of standing, its reasoning is more akin to the waiver analysis in *Blue & Gold Fleet, L.P. v. United States,* 492 F.3d 1308, 1315–16 (Fed.Cir.2007), which held four years later that a plaintiff must object to patent errors in a solicitation prior to the close of the bidding process. *See, e.g., Pacific Helicopter Tours, Inc. v. United States,* No. 06–613, 2007 WL 5171114, at *13 (Fed.Cl. Jan. 12, 2007) (citing *ABF Freight* as a case analogous to *Blue & Gold Fleet*). When *ABF Freight* was decided in 2003, the Federal Circuit had not yet addressed this waiver issue, and the *ABF Freight* court's primary concern appears to have been addressing plaintiff's tardy objections to the revised language of the solicitation, which the court styled as a matter of standing. Thus *ABF Freight* is not instructive.

In summary, this court will follow the precepts applied in *Weeks Marine* and *Systems Application*. Like *Weeks Marine,*

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the facts of National's case provide no "factual foundation" for a "substantial chance" analysis, because National does not seek a contractual award but instead seeks to remedy an alleged violation of procurement law that has affected the task order pool. *See Navarro,* 94 Fed.Cl. at 230. Accordingly, the court will analyze National's complaint to determine whether it demonstrates a "non-trivial competitive injury which can be redressed by judicial relief." *Weeks Marine,* 575 F.3d at 1362.

Turning to the factual context of this case, National is an "actual" bidder because, as a matter of fact, it bid on this IDIQ solicitation. As discussed *supra,* National's status as a contract awardee does not by itself deprive this court of bid protest jurisdiction. *See Systems Application,* 691 F.3d at 1381–82 (concluding that a proper protest was not subject to CDA).

National also has a direct economic interest, because it has shown a "non-trivial competitive injury which can be redressed by judicial relief." *Weeks Marine,* 575 F.3d at 1362. National alleges that the RFP imposed conditions on reopening the competition and that TRANSCOM violated these RFP provisions. Because the court is considering a motion under RCFC 12(b)(1), it must initially decide only the jurisdictional issue, not the merits. *See Engage Learning,* 660 F.3d at 1355. If plaintiff is correct, the competition for roughly $296 million of task orders available to the IDIQ pool will be affected to National's detriment. Plaintiff's complaint avers that it seeks more than just $2,500; it seeks to compete for roughly $296 million in task orders. Compl. ¶¶ 32–33. And because of the government's allegedly illegal conduct in adding further awardees, that competition will be "significant[ly]" increased, as the parties agree. *See* Def.'s Opp'n at 9 (United will be "a significant source of competition at the task order level"); Compl. ¶¶ 32–33. That is a non-trivial competitive injury, prejudicial to National. *See, e.g., Canadian Lumber Trade Alliance v. United States,* 517 F.3d 1319, 1332–33 (Fed.Cir.2008) (holding increased competition is an injury-in-fact under Article III, and discussing the doctrine of "competitor standing" in the international trade context); *BayFirst Solutions, LLC v. United States,* 104 Fed.Cl. 493, 501 (2012) (loss of competitive advantage is non-trivial competitive injury under *Weeks Marine*); *URS Fed. Servs.,* 102 Fed.Cl. at 669 (same).

Despite this, the government has argued, and GAO agrees, that a multiple-award IDIQ ***296** contract holder has no interest in the size of the IDIQ task order pool because that holder has only a right to some nominal minimum amount (in this case, $2,500) of task orders. Def.'s Mot. at 4; Second GAO Decision at 4. That view is not realistic because potential contractors bid on IDIQ contracts to compete for task orders, which can amount to much more than the minimum. *See, e.g., Serco Inc. v. United States,* 81 Fed.Cl. 463, 466 (2008) (considering an IDIQ solicitation for up to $50 billion in task orders over five years, with a minimum guarantee of $2,500 for each awardee). The $2,500 task order minimum is only a "peppercorn"—a nominal amount to satisfy the contract law doctrine of consideration. *See, e.g., Coyle's Pest Control, Inc. v. Cuomo,* 154 F.3d 1302, 1304 (Fed.Cir.1998) ("The contract at issue in this appeal ... does not contain the necessary elements of an enforceable indefinite quantity contract, nor an enforceable requirements contract. The enforcement of such a contract would fail for lack of consideration in the absence of a clause stating a minimum quantity.") (quoting and affirming a decision by a board of contract appeals). The minimum satisfies the law of consideration, but it does not mean that IDIQ contractors lack a "direct economic interest" in the competition for task orders. [10] In sum, National has "a definite economic stake in the solicitation being carried out in accordance with applicable laws and regulations." *Weeks Marine,* 575 F.3d at 1362.

10 Subsection 2304c(e) of Title 10 prohibits protests "in connection with the issuance" of a "task or delivery order" for agencies subject to Title 10, except for orders valued in excess of $10 million, as to which GAO has exclusive jurisdiction. This statute is not relevant, because National's protest is not in connection with a task order.

That National is an "interested party" within the meaning of Paragraph 1491(b)(1) is supported by the case of *Glenn Defense Marine (ASIA) PTE, Ltd. v. United States,* in which a protestor that won an IDIQ contract had standing to challenge the government's award of another IDIQ contract under the same solicitation to different offeror. 97 Fed.Cl. 311, 317 n. 3 (2011), *appeal on other grounds dismissed as moot after government settled with plaintiff,* 469 Fed.Appx. 865 (2012). *Glenn Defense* devoted only a footnote to standing as an interested party, yet its factual similarity makes the case instructive here. In *Glenn Defense,* the government originally intended to procure one IDIQ contract for four ports in the Philippines, but then awarded two IDIQ contracts, each covering two ports. *Id.* at 311–17. Glenn Defense received one of these IDIQ contracts, yet it protested the second award arguing that the solicitation required one IDIQ contract award covering all four ports. The court concluded Glenn Defense

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had standing. *Id.* at 317 n. 3. One might argue that *Glenn Defense* is like a traditional post-award protest by a losing offeror, because the protestor's one IDIQ contract covered only two of the four ports and the protestor filed suit seeking to have the other two ports included in its one IDIQ contract. *Id.* at 323 (noting that defendant said during litigation that it "did not intend more than one contractor to compete for task orders under any given IDIQ contract"). And, in *Glenn Defense* the court concluded without analysis that the "central nature of the allegation of error" was sufficient to meet the "preliminary 'standing' threshold." *Id.* at 317 n. 3. The facts of the case, nonetheless, suggested that Navy ships in the Philippines could dock at any of the four ports, meaning that for practical purposes this was a multiple-award IDIQ contract in which the parties would compete for ship traffic. *Id.* at 314 (noting that ports had to have the capacity to husband up to eight ships at a given time). The court's decision even noted that, based on extrinsic evidence, the government may have considered that procurement to be a multiple-award IDIQ procurement in which Glenn Defense would actually compete for task orders. *See id.* at 322 (noting that the government responded to bidder's questions by reserving the right to make multiple awards pursuant to FAR § 16.504(c)(1), and only during litigation did it disclaim any intent that more than one contractor might compete for task orders). Under either view, the case is instructive because the protestor had won an IDIQ contract, yet it had standing to challenge an award under the same solicitation to another IDIQ awardee, on the theory ***297** that the solicitation limited the number of possible IDIQ awardees. [11]

11 Notably, on appeal the government conceded and gave Glenn Defense one IDIQ contract for *all* of the ports. *Glenn Def. Marine (ASIA) PTE, Ltd. v. United States,* 469 Fed.Appx. 865, 866 (Fed.Cir.2012). Thus its protest was moot. Nonetheless, Glenn Defense did not drop its appeal, arguing its case was not moot because the government's illegal excess award was capable of repetition, yet evading review. The Federal Circuit rejected that argument, concluding the claims were moot and would not evade review in the future: "[e]ven if the Navy is likely to continue to use solicitations for multiple-lot contracts ... and Glenn Defense is likely to continue to bid on them, we do not see why the refusal to award a single [IDIQ] contract rather than a split award [IDIQ] contract is the sort of action that is likely forever to 'evade review.' " *Id.* at 867 (quoting *Lewis v. Cont'l Bank Corp.,* 494 U.S. 472, 481, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) for the law of Article III mootness). The Federal Circuit's comment, which considers Article III standing elements similar to those pertinent to Paragraph 1491(b)(1), implicitly approves of a protestor having standing to challenge the government's decision to award more IDIQ contracts than contemplated by a solicitation.

In short, National has alleged violations of procurement law and regulations that bring its protest within the ambit of Paragraph 1491(b)(1), and its allegations of harm suffice to establish its standing to sue.

NATIONAL'S MOTION FOR PRELIMINARY EQUITABLE RELIEF

A. *Standard for Decision under RCFC 65*

[14] **[15]** This court "may issue" a preliminary injunction or temporary restraining order on motion or application of a party. RCFC 65(a)(1), (b)(1). The party seeking preliminary injunctive relief must establish that (1) it is likely to succeed on the merits; (2) it will suffer irreparable harm if the injunction is not granted; (3) the balance of hardships tips in its favor; and (4) that a preliminary injunction will not be contrary to the public interest. *FMC Corp. v. United States,* 3 F.3d 424, 427 (Fed.Cir.1993). No single factor is dispositive, but "a protestor must establish the first two factors, likelihood of success on the merits and irreparable harm, before a preliminary injunction can be granted." *Lockheed Martin Corp. v. United States,* 124 Fed.Cl. 709, 721 (2016) (citing *Per Aarsleff A/S v. United States,* 123 Fed.Cl. 147, 156–57 (2015) (in turn citing *Altana Pharma AG v. Teva Pharm. USA, Inc.,* 566 F.3d 999, 1005 (Fed.Cir.2009))).

B. *Whether National Is Likely to Succeed on the Merits*

[16] **[17]** **[18]** **[19]** This court reviews agency procurement decisions "pursuant to the standards set forth in section 706 of title 5 [the Administrative Procedure Act]." 28 U.S.C. § 1491(b)(4). The cited section "provides, in relevant part, that a 'reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " (*Centech Grp.,*

Inc. v. United States, 554 F.3d 1029, 1037 (Fed.Cir.2009) (quoting 5 U.S.C. § 706)). Accordingly, the court may set aside a procurement action under Paragraph 1491(b)(4) if "(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." *Impresa Construzioni Geom. Domenico Garufi v. United States,* 238 F.3d 1324, 1332 (Fed.Cir.2001). Of particular relevance to this case, "[i]t is hornbook law that agencies must evaluate proposals and make awards based on the criteria stated in the solicitation." *Banknote Corp. of Am., Inc. v. United States,* 56 Fed.Cl. 377, 386 (2003). Interpretation of a solicitation is a question of law. *Banknote Corp. of Am., Inc. v. United States,* 365 F.3d 1345, 1353 (Fed.Cir.2004). "If the provisions of the solicitation are clear and unambiguous, they must be given their plain and ordinary meaning." *Id.* (citing *Coast Fed. Bank, FSB v. United States,* 323 F.3d 1035, 1038 (Fed.Cir.2003) (*en banc*)).

[20] National first argues that the RFP's reopening provisions barred the government from making any awards after the government's initial award of five contracts on June 11, 2015. Compl. ¶ 60. Those provisions said that the government could "reopen" the competition to add contractors to the IDIQ pool if there was a "shortfall in meeting the requirements among the existing" pool of awardees or if the government found that "it ***298** is in the [g]overnment's best interest to add new contractors to the original pool of IDIQ contract holders." Compl. ¶ 44 (citing RFP at 52). National considers that the "original pool" of contractors was determined on June 11, 2015 when the government awarded five contracts. For the government to make an award after that time, National contends that TRANSCOM needed to test whether it could meet its shipping needs by placing orders subject to competition among the awardees and then comply with the reopening provisions if it found its needs could not be met.

National's argument comports with a reasonable interpretation of the language of the solicitation, which specifically provides that "the [g]overnment will compete [the] requirements amongst all existing IDIQ contract holders to determine if the contract holders can adequately fulfill the needed capacity." RFP at 52. Reopening would arguably occur only after the contract holders were unable to meet capacity ("if there is [a] shortfall in meeting the requirements") or where "it is in the [g]overnment's best interest to add new contractors to the original pool of IDIQ contract holders." *Id.* Then, the addition of new contractors would follow posting in "FedBizOps [to] allow[ ] new ... offerors the opportunity to compete in a full and open competition." *Id.* Because the solicitation included provisions for "reopening" the IDIQ solicitation to add contractors to the "original pool," it implies that the solicitation must first close and thereby create an "original pool." And because the government awarded five contracts on June 11, 2015, one might say these five contractors constituted the "original pool." Despite this implication, the solicitation is ambiguous and makes no express delination on when the members of the "original pool" are selected.

[21] That ambiguity is likely resolved by examining the provisions regarding acceptance of offers. As a general rule, an offeror may define when his or her offer can be accepted. *International Tel. & Tel., ITT Defense Commc'ns Div. v. United States,* 453 F.2d 1283, 1290–91 (Ct.Cl.1972) ("The offeror's limitation of the time is not operative if it is not communicated to the offeree ... but if so communicated it operates with certainty."); *see also Restatement (Contracts) Second,* § 41(1) (1981) ("An offeree's power of acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time."). Here, the solicitation required offerors to hold offers open for 180 days after submission on March 16, 2015. RFP at 86. It thus contemplated acceptance by TRANSCOM at any point during that time. Because the government had the power to accept offers on this solicitation for 180 days, by implication the "original pool" would not close until that time expired. Only after those 180 days, when the government could no longer accept offers, did the "reopening" provisions come into effect. Turning to the facts of this case, the 180–day period began to run on March 16, 2015. RFP at 2. Although the government initially awarded five contracts on June 11, 2015, its decision to award a sixth contract to United on July 17, 2015 was still within the 180–day period. On this reading, the reopening provisions of the RFP were not yet in effect, meaning the government did not violate them by making an award on July 17, 2015. The government thus has a reasonable argument that the reopening provisions of the RFP were not triggered.

National next argues that the United States violated the solicitation by awarding six IDIQ contracts. Compl. ¶¶ 40–42. The relevant solicitation language provides: "[t]he [g]overnment intends to award approximately four (4) IDIQ contracts resulting from this solicitation to provide [g]overnment shippers flexibility of choice and service coverage." RFP at 87. In this context, the word "approximately" generally means "nearly exact" or nearly "accurate." *Webster's II New College Dictionary* 56 (2001).

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It does not mean "precisely" or "exactly." The phrase "approximately four" therefore permits the government to award more than four contracts. National appears to concede this point, because it does not challenge the fifth contract award. Instead, it challenges only the sixth award, which went to United. The question then is whether "approximately four" means "not more than five." Plaintiff cites no authority—no definitions in the solicitation or regulations—to explain why "approximately four" should have such meaning. ***299** The court accordingly is not convinced that an award of six contracts is not an award of "approximately" four contracts.

National's final argument is that United lacks the requisite past performance history. Compl. ¶ 62. National concedes that it lacks evidence supporting this contention because it does not yet have access to the administrative record. Pl.'s Mot. at 4. The court understands National's predicament, but National still has the burden of providing some evidence, even if only affidavits from National's employees or others based on their personal knowledge, in support of its contention. Without more the court cannot evaluate the merits of this claim. Moreover, even if National is correct that United lacks past performance history, then at worst it would have received an "unknown confidence" rating, which would be "treated neither favorably nor unfavorably." RFP at 89.

For these reasons, National has not established that it is likely to succeed on the merits of its protest, and the court cannot issue a preliminary injunction or a temporary restraining order. *See Lockheed,* 124 Fed.Cl. at 721 (declining to preliminarily enjoin contract award when protestor did not establish a likelihood of success or irreparable harm) (citing *Altana Pharma,* 566 F.3d at 1005). It is unnecessary to address the remaining factors for injunctive relief.

CONCLUSION

The United States' motion to dismiss is DENIED. National's motion for a preliminary injunction and its application and supplemental application for a temporary restraining order are also DENIED. On or before May 10, 2016, the parties shall submit a Joint Status Report regarding further proceedings in this matter.

It is so **ORDERED**.

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United States Court of Federal Claims.

AERO SPRAY, INC. d/b/a Dauntless Air, Plaintiff,
v.
The UNITED STATES, Defendant,
and
Henry's Aerial Service, Inc., and Fletcher Flying Service, Inc. Defendant-Intervenors.

No. 21-1079C
|
(Filed Under Seal: October 21, 2021)
|
(Filed: October 28, 2021)

Synopsis

Background: Awardee of a multiple award indefinite delivery indefinite quantity (IDIQ) contract, in which awardee agreed to provide amphibious water scooping fixed-wing aircraft services to government for fighting wildfires on public lands, brought post-award bid protest challenging decision of United States, by and through Department of the Interior, to also award IDIQ contracts to two of awardee's competitors, both of which intervened into bid-protest action. Government and competitors moved to dismiss awardee's complaint for lack of standing and because action was untimely. Parties also moved for judgment on the administrative record.

Holdings: The Court of Federal Claims, Matthew H. Solomson, J., held that:

[1] awardee received contract award for all that it had proposed, and so was not an actual or prospective offeror with respect to contracts awarded to competitors, and thus awardee lacked standing to bring post-award bid protest;

[2] awardee did not have a direct economic interest affected by award of contracts to competitors, such that awardee lacked standing to bring post-award bid protest;

[3] in failing to challenge patent ambiguity in government's solicitation prior to close of bidding process, awardee waived its ability to raise in post-award bid protest that award of contracts to competitors was arbitrary, capricious, and abuse of discretion; and

[4] even if awardee had standing and action was timely, permanent injunctive relief enjoining contract awards to competitors was not warranted since balance of harms did not favor injunction and awardee failed to show irreparable harm.

Defendants' motions to dismiss granted.

Procedural Posture(s): Motion to Dismiss; Motion for Judgment on Administrative Record.

West Headnotes (33)

[1] Federal Courts

The party invoking federal jurisdiction bears the burden of establishing standing.

[2] Federal Courts

Where a plaintiff lacks standing, its case must be dismissed. RCFC, Rule 12(b)(1).

[3] Federal Courts

Article III case-or-controversy requirement is satisfied only where plaintiff has standing. U.S. Const. art. 3, § 2, cl. 1.

[4] Federal Courts

The Court of Federal Claims, though an Article I court, applies the same standing requirements enforced by other federal courts created under Article III. U.S. Const. art. 3, § 2, cl. 1; 28 U.S.C.A. §§ 171, 2519.

[5] Constitutional Law

The irreducible constitutional minimum of standing consists of three elements, including that the plaintiff allege facts demonstrating that it: (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed

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by a favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

[6] Constitutional Law

Injury in fact is a constitutional requirement for Article III standing, and Congress cannot erase Article III standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing. U.S. Const. art. 3, § 2, cl. 1.

[7] Constitutional Law

To establish injury in fact, so as to support Article III standing, a plaintiff must show that it suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical. U.S. Const. art. 3, § 2, cl. 1.

[8] Constitutional Law

Article III standing requires concrete injury even in context of statutory violation. U.S. Const. art. 3, § 2, cl. 1.

[9] Constitutional Law

A plaintiff could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III standing. U.S. Const. art. 3, § 2, cl. 1.

[10] Constitutional Law

Financial or economic interests are legally protected interests for the purposes of the standing doctrine. U.S. Const. art. 3, § 2, cl. 1.

[11] Constitutional Law

Congress may enact statutes that provide would-be plaintiffs with standing subject only to constraints of Article III itself; alternatively, Congress may impose heightened standing requirements. U.S. Const. art. 3, § 2, cl. 1.

[12] Administrative Law and Procedure

Administrative Procedure Act (APA) standing test, which states that a person adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof, is not particularly stringent. 5 U.S.C.A. § 702.

[13] Administrative Law and Procedure

While a person suing under the Administrative Procedures Act (APA) must satisfy not only Article III standing requirements, but also must assert an interest arguably within the zone of interests to be protected or regulated by the statute or regulation allegedly violated, that latter prudential standing test is not meant to be especially demanding. U.S. Const. art. 3, § 2, cl. 1; 5 U.S.C.A. § 702.

[14] Federal Courts

A party to a bid protest action seeking to establish jurisdiction under the Tucker Act must show that it meets the Tucker Act's standing requirements, which are more stringent than the standing requirements imposed by Article III of the Constitution. U.S. Const. art. 3, § 2, cl. 1; 28 U.S.C.A. § 1491(b)(1).

[15] United States

Awardee of indefinite delivery indefinite quantity (IDIQ) contract to provide amphibious water scooping fixed-wing aircraft services to government for fighting wildfires received contract award for all that it had proposed, and so was not an actual or prospective offeror with respect to contracts awarded to competitors, and thus awardee lacked standing to bring post-award bid protest challenging competitors' contracts; allowing awardee to challenge procurement results would have improperly permitted awardee to transform

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itself back into prospective offeror, case did not involve objection to or cancellation of solicitation, solicitation did not contemplate multiple contract awards for same offeror, and awardee did not allege government failed to award it a contract it should have received. 28 U.S.C.A. § 1491(b); 31 U.S.C.A. §§ 3551(1), 3551(1)(C), 3551(2)(A).

[16] Statutes

Court of Federal Claims does not construe statutes in vacuum, and words of statute must be read in their context and with view to their place in overall statutory scheme.

[17] United States

In a multiple award procurement where an offeror receives the very contract it sought, i.e., the only contract for which it submitted a proposal, that offeror cannot be considered an "actual offeror" with respect to the other contract awards it did not seek, and, indeed, could not have sought. 31 U.S.C.A. §§ 3551(1), 3551(2)(A).

[18] United States

General rule is that once a party becomes an awardee, they are no longer an "interested party" with standing to bring a bid protest claim. 28 U.S.C.A. § 1491(b).

[19] United States

Although most federal contractors were at one point offerors for the contracts they received, once contracts are awarded, their interests in disputes with government are those of contractors, not offerors.

[20] United States

Merely labeling a plaintiff an "awardee" of a procurement contract with the government is not sufficient to conclude that it is not an "interested party" for all purposes, including for that of standing to bring a bid protest; rather the court must look to the contract award that is the subject of the protest and ask whether the protesting plaintiff is an actual, but disappointed, offeror for that award. 28 U.S.C.A. § 1491(b).

[21] United States

Awardee of indefinite delivery indefinite quantity (IDIQ) procurement contract, in which awardee agreed to provide government with amphibious water scooping fixed-wing aircraft services for fighting wildfires, did not have a direct economic interest affected by award of additional IDIQ contracts to awardee's competitors, such that awardee lacked standing to bring post-award bid protest challenging contract awards to competitors, although awardee could have economic interest in avoiding future competition; awardee received everything to which it was entitled given its proposal and pursuant to solicitation, awardee was not a "disappointed bidder," and even if awardee was correct that awards to competitors were improper, awardee would not be entitled to further contract award. 28 U.S.C.A. § 1491(b); 31 U.S.C.A. § 3551(2)(A).

[22] United States

The post-award standing test for a bid protest proceeding requires that a plaintiff allege facts which, if true, demonstrate that but for the alleged errors in the procurement, the plaintiff would have had a substantial chance of receiving the challenged contract award at issue. 28 U.S.C.A. § 1491(b); 31 U.S.C.A. §§ 3551(1), 3551(2)(A).

[23] United States

An awardee, by definition, is not an actual or prospective offeror, and the statutory definition of an interested party expressly bars protests where the protester is the awardee of the challenged contract. 28 U.S.C.A. § 1491(b).

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[24] United States

A contract awardee in a multiple award indefinite delivery indefinite quantity (IDIQ) procurement cannot demonstrate the requisite direct economic interest for standing in a post-award bid protest. 28 U.S.C.A. § 1491(b).

[25] United States

Due to the nature of indefinite delivery indefinite quantity (IDIQ) contracts, an awardee has no legally cognizable expectation of receiving future task orders but only a guaranteed a minimum quantity of orders and a fair opportunity to compete for future task orders.

[26] United States

By definition, an indefinite delivery indefinite quantity (IDIQ) contract awardee cannot be an actual or prospective offeror with respect to another IDIQ contract awarded under the same solicitation based on the simple fact that a contractor that has already been awarded an IDIQ contract cannot be awarded additional IDIQ contracts, even if it could show flaws in the agency's award of those contracts. 28 U.S.C.A. § 1491(b).

[27] United States

A plaintiff may have standing to pursue bid protest action even if that particular action does not itself seek contract award, but a plaintiff may not qualify as an interested party where it is not seeking the contract award at all either in the procurement generally or in a Government Accountability Office (GAO) protest. 28 U.S.C.A. § 1491(b); 31 U.S.C.A. § 3551(2)(A).

[28] United States

Government's solicitation, which did not clearly state whether offerors' proposed aircraft needed to be in operational configuration at the time of proposal submission or at a later date, was patently ambiguous, and thus, awardee of indefinite delivery indefinite quantity (IDIQ) procurement contract, in failing to challenge the patent ambiguity in government's solicitation prior to the close of the bidding process, waived its ability to raise in post-award bid protest that government's award of IDIQ contracts to competitors was arbitrary, capricious, and an abuse of discretion on basis that competitors did not have aircrafts ready to perform at the time of competitors submitted proposals; government effectively adopted an interpretation that awardee did not prefer. 28 U.S.C.A. § 1491(b).

[29] United States

A party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims. 28 U.S.C.A. § 1491(b).

[30] United States

When a solicitation is patently ambiguous, the government remains free to select a reasonable interpretation, as it sees fit, during the evaluation and award segments of the procurement process.

[31] United States

Permanent injunctive relief enjoining contract awards to awardee's competitors was not warranted since balance of harms did not favor injunction and awardee failed to show irreparable harm in post-award bid protest brought by awardee, which had received indefinite delivery indefinite quantity (IDIQ) contract to provide amphibious water scooping fixed-wing aircraft services to government for fighting wildfires; injunction would risk harm to Department of Interior's firefighting capabilities and nation's woodlands, government had a present need for all firefighting aircraft services for which it contracted, including those of

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competitors, and any harm to awardee would have been highly limited in duration since awardee could not stop government from adding additional contractors. 28 U.S.C.A. § 1491(b)(2).

[32] Injunction

In evaluating whether permanent injunctive relief is warranted in a particular case, a court must consider: (1) whether the plaintiff has succeeded on the merits; (2) whether the plaintiff has shown irreparable harm without the issuance of the injunction; (3) whether the balance of the harms favors the award of injunctive relief; and (4) whether the injunction serves the public interest.

[33] Injunction

The Court of Federal Claims' consideration of extra-record evidence is appropriate when evaluating prejudice or the propriety of injunctive relief.

Attorneys and Law Firms

Lee Dougherty, Effectus PLLC, Washington, D.C., for Plaintiff.

Albert S. Iarossi, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for Defendant. With him on the briefs were Brian M. Boynton, Acting Assistant Attorney General, Civil Division, Martin F. Hockey, Jr., Acting Director, and Douglas K. Mickle, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C. Of counsel was Alexander W. Fichtel, United States Department of Interior, Office of the Solicitor, Rocky Mountain Region, Lakewood, CO.

Brian G. Walsh, Wiley Rein LLP, Washington, D.C., for Defendant-Intervenor, Henry's Aerial Service, Inc. With him on the briefs were Craig Smith and Cara L. Lasley.

Leonard Collins, GrayRobinson, P.A., Tallahassee, FL, for Defendant-Intervenor, Fletcher Flying Service, Inc. With him on the briefs was Allison Goodson.

OPINION AND ORDER [*]

[*] On October 21, 2021, the Court filed, under seal, this opinion and order and provided the parties the opportunity to propose redactions. On October 28, 2021, the parties filed joint proposed redactions, ECF No. 53, which this Court adopts, in full, and accordingly reissues this public version of this opinion and order. Redacted information is noted with [* * *].

SOLOMSON, Judge.

***1** Since 1947, Smokey Bear has taught the American public to "Remember...Only YOU Can Prevent Forest Fires." [1] Unfortunately, wildfires remain a major problem in the United States. [2] The federal government is responsible for responding to wildfires that occur in the approximately 600 million acres of federal lands, [3] and procures a variety of resources to confront this daunting task—including, as relevant here, amphibious water scooping fixed-wing aircraft services for firefighting.

1 *About the Campaign*, Smokey Bear, https://smokeybear.com/en/smokeys-history/about-the-campaign (last visited Aug. 19, 2021); *see also* Pub. L. No. 93-318, 88 Stat. 244 (codified at 16 U.S.C. §§ 580p *et seq.*).

2 Katie Hoover & Laura A. Hanson, Cong. Rsch. Serv., IF 10244, Wildfire Statistics 1–2 (2021) ("From 2011 to 2020, there were an average of 62,805 wildfires annually and an average of 7.5 million acres impacted annually. ... Most wildfires are human-caused (88% on average from 2016 to 2020) ....").

3 *Id.* at 1 ("[T]he U.S. Department of Agriculture ... carries out wildfire management and response across 193 million acres of the National Forest System ... [and t]he Department of the Interior ... manages wildfire response for more than 400 million acres of national parks, wildlife refuges and preserves, other public lands, and Indian reservations.").

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In this post-award bid protest, Plaintiff, Aero Spray, Inc. d/b/a Dauntless Air ("Aero Spray"), an awardee of a multiple award indefinite delivery indefinite quantity ("IDIQ") contract for the aforementioned firefighting services, challenges the decision of Defendant, the United States, acting by and through the Department of the Interior ("DOI" or the "Agency"), to also award IDIQ contracts to Defendant-Intervenors, Henry's Aerial Service, Inc. ("Henry's Aerial") and Fletcher Flying Service, Inc. ("Fletcher Flying"). [4] Aero Spray contests the other contract awards to Henry's Aerial and Fletcher Flying as arbitrary, capricious, and otherwise not in accordance with law and seeks a permanent injunction preventing DOI from proceeding with them. The government and Defendant-Intervenors moved to dismiss Aero Spray's complaint for lack of standing and because the action is untimely pursuant to the *Blue & Gold* waiver rule. The parties also filed motions for judgment on the administrative record pursuant to Rule 52.1 of the Rules of the United States Court of Federal Claims ("RCFC").

4 Fletcher Flying Service, Inc. appears to have changed its name to Coastal Air Strike in mid-2021. *Fletcher Flying Service Rebrands to Coastal Air Strike*, Coastal Air Strike (Aug. 11, 2021), https://coastalairstrike.com/fletcher-flying-service-rebrands-to-coastal-air-strike/. Because the parties refer only to Fletcher Flying, this opinion will do the same.

For the reasons explained below, the Court **GRANTS** the government's and Defendant-Intervenors' respective motions to dismiss. The Court **DENIES** Aero Spray's motion for judgment on the administrative record. Finally, the Court **DENIES** as **MOOT** the pending motions to supplement the administrative record.

I. FACTUAL AND PROCEDURAL BACKGROUND [5]

5 This background section constitutes the Court's findings of fact drawn from the administrative record. Judgment on the administrative record, pursuant to RCFC 52.1, "is properly understood as intending to provide for an expedited trial on the record" and requires the Court "to make factual findings from the record evidence as if it were conducting a trial on the record." *Bannum, Inc. v. United States*, 404 F.3d 1346, 1354, 1356 (Fed. Cir. 2005). Citations to the administrative record (ECF No. 21) are denoted as "AR," followed by the page number.

A. The Solicitation

***2** To assist with fighting wildfires, DOI has a need to "acquire single engine amphibious water scooping fixed-wing aircraft services for the Bureau of Land Management (BLM) and other federal and state agencies[.]" AR 27; *see also* AR 1. DOI specifically sought to acquire "FireBoss" aircraft services "to support fire suppression, water scooping, and fire-retardant delivery operations" for "areas otherwise difficult to access." AR 10–11. A FireBoss aircraft is typically a single engine aircraft modified and outfitted with specialized equipment, including amphibious float and scooper packages. AR 1, 5.

Aero Spray and Air Spray USA, Inc. ("Air Spray") performed the predecessor contracts to those at issue here. AR 11. With those contracts scheduled to expire on April 30, 2021, [6] DOI issued, on October 22, 2020, Solicitation No. 140D8020R0019, as a Request for Proposals (the "Solicitation" or the "RFP") to procure the services of "a combined fleet of *approximately* 20–24 [FireBoss] aircraft." AR 10, 23 (emphasis added). The RFP is an unrestricted acquisition, providing for multiple award IDIQ contracts, with an order ceiling of $46,000,000. AR 10; *see also* AR 16 ("The Government intends to award multiple contracts.").

6 These contracts allowed for a six-month extension "in the event of unforeseen delays (such as a protest)." AR 10.

Following a series of RFP amendments, including a question-and-answer document ("Q&As"), the Agency issued a revised, conformed Solicitation on December 16, 2020. AR 330 (RFP Amendment 0006); AR 332-431 (revised Solicitation).

The RFP provided for a one-year base period, and four single-year option periods. AR 1, AR 337–339. Proposals were initially due November 23, 2020, but DOI subsequently extended the closing date to December 23, 2020. AR 23, 330, 955, 1375–76.

Pursuant to the RFP, the Agency was required to "evaluate all acceptable offers based on the [following] evaluation factors[:]"(1) Technical Capability; (2) Organizational Safety; (3) Past Performance; and (4) Evaluated Price. AR

412 (RFP § D8.1 ("Evaluation Factors")). As relevant here, the RFP provided that offerors "must propose an aircraft that meets or exceeds the Minimum Aircraft Requirements specification in Section A of this solicitation" and that an "offer will be rated Unsatisfactory if the aircraft proposed fails to meet any of the Minimum Aircraft Requirements specified in Section A of this solicitation." AR 412 (RFP § D8.2 ("Technical Capability")).

The RFP also provided that the government will place orders for services via "task order request[s] for proposal[s]" — known as TORPs — which would be issued to contract holders. AR 375 (RFP § C15.1.1). While awarded contracts would permit discounted pricing, "[c]ontractors' pricing for task orders shall not exceed the prices in the IDIQ price schedule." *Id.* On the other hand, the RFP cautioned that "[d]ue to the nature of firefighting, urgent orders are likely" where "[p]ursuant to FAR 16.505(b)(2), fair opportunity need not be provided ...." AR 375 (RFP § C15.1.2). "In such cases, the ordering activity will select the contractor it deems to offer the best value to the Government[,] ... [but] [b]ecause urgent orders may be issued under the IDIQ without the opportunity to submit a task order proposal with revised pricing, offerors are encouraged to include their best pricing in their IDIQ price proposals." *Id.*

Finally, the RFP provided for the onboarding of additional contractors after the initial contract awards, as follows:

> The Government reserves the right to announce a new competition (Onboarding) for the purpose of adding additional multiple award, indefinite delivery, indefinite quantity (IDIQ) contract holders. Onboarding procedures may be implemented at any time over the life of the contract (five years from the date of initial award) by reopening the competition and utilizing the same basis of award established in the original solicitation 140D8020R0019. Bureau customers will initiate the need for additional contract holders by contacting the CO. The CO will then assess the need for additional support or whether current contract holders can satisfy the need. Should additional support be required, the CO will publicize a notice by modifying the original solicitation, and complete a new source selection. Contracts awarded through these Onboarding Procedures will include the same terms and conditions as those in the basic contract. Neither the overall period of performance nor the ceiling of the basic contract will be revised as a result of implementing the Onboarding procedures.

***3** AR 380 (§ C27).

B. The Question-and-Answer Amendment to the Solicitation

DOI provided offerors with an opportunity to submit questions to the Agency to attempt to clarify any ambiguities in, or to raise other issues with, the RFP. AR 121.

On November 13, 2020, DOI published the resulting Q&As as an amendment to the RFP, including the following pertinent exchanges:

> Question 2) We are in the midst of adding two Fire Bosses to the fleet. They will both be completed by year end. One very well may be completed and have a Weight and Balance and MEL done by the submission date for the Solicitation. We own the aircraft, we own the floats, gates and avionics. We may just not have all of it put together for a final Weight & Balance by 11/23. In that case, how should we handle listing the aircraft?
>
> Answer 2) As per Section B32.1, referenced by D4.11.1.2, provide a weight and balance *for each proposed aircraft* with the aircraft in contract configuration. The proposal must include *at least one aircraft that meets the minimum requirements of this solicitation*. Section C17 is added to the Solicitation to define procedures for adding aircraft after initial award(s). Also see Exhibit 16 Add/Remove Aircraft/Equipment Request Form.
>
> * * * *
>
> Question 3) Section A1 states the Aircraft Configuration required for listing in response to the Solicitation. For

a Contractor to offer an aircraft in response to this solicitation, does the aircraft need to be in operational Fire Boss contract configuration, including an acceptable Weight & Balance (in accordance with Section B32) and Equipment List that would allow the Aircraft Questionnaire to be filled out?

Answer 3) A proposal must include at least one aircraft that meets the minimum requirements of Section A1, and all related requirements and documentation as stated in the solicitation, to include a current weight & balance report, Exhibit E-2 and Exhibit E-3. Additional aircraft may be offered after initial award as detailed in Question 2. See Question 2 for adding aircraft after initial award(s), and see Exhibit 16 Add/Remove Aircraft/Equipment Request Form.

* * * *

Question 26) Exhibit E-2: Can a vendor include an aircraft in its offer that will not be delivered to that vendor in Fire Boss configuration until after the solicitation closes? Would it be acceptable for the vendor to base its empty weight and payload calculations on an aircraft in wheel configuration with estimates on what the Fire Boss will weigh after installation of avionics, a fire gate, and Wipaire floats and accessories (Accurate W&B Equipment List; and performance calculations would not be completed until after aircraft delivery in Fire Boss configuration)?

Answer 26) See Questions 2 & 3.

AR 121–23, 127 (emphasis added).

C. Proposals, Evaluations, and Contract Awards

Four offerors submitted timely proposals: Aero Spray; Air Spray; Henry's Aerial; and Fletcher Flying. AR 1364. As part of their respective proposals, Aero Spray proposed fifteen FireBoss aircraft, Air Spray proposed five, Henry's Aerial proposed four, and Fletcher Flying proposed two. AR 1365–71.

***4** Two of Aero Spray's proposed aircraft were "new aircraft and currently at the factory[.]" AR 1365. Although the Source Selection Evaluation Board ("SSEB") found certain deficiencies with those aircraft, the SSEB assessed them as "relatively minor" in terms of the company's "ability to complete in a timely manner prior to contract inspection/performance." *Id.* The SSEB also noted that Aero Spray "provided sufficient information within the proposal to ensure the aircraft will be delivered in short time frame, and aircraft will meet contract specifications at time of inspection." *Id.* (noting with respect to one aircraft that "floats [are] not installed" and that another's "fire gate/tank [are] not currently installed"). All of Aero Spray's proposed aircraft were recommended for award. *Id.*

Both of Fletcher Flying's proposed aircraft similarly had "no floats currently installed." AR 1369. Consistent with the SSEB's determination regarding Aero Spray's two deficient aircraft, the SSEB concluded that Fletcher Flying's "offered aircraft ... have been determined acceptable." *Id.* Once again, the SSEB explained that "[a]lthough floats are not currently installed, this was considered to be relatively minor regarding the [company's] ability to complete in a timely manner prior to contract inspection/performance and addressed [in the] offeror's proposal." *Id.* ("Sufficient information was provided by the offeror that the aircraft will meet or exceed the standards, therefore deemed acceptable and recommend for award.").

The four aircraft Henry's Aerial proposed likewise were "not currently configured on floats, and have equipment install and/or alterations left to be done." AR 1371. Just as the SSEB had determined for Aero Spray and Fletcher Flying, the SSEB concluded that the issues with Henry's Aerial proposed aircraft were "relatively minor regarding the [company's] ability to complete in a timely manner prior to contract inspection/performance" and that "[t]here is sufficient information within the proposal to ensure the aircraft will be delivered in a short time frame, and that all aircraft will meet or exceed the standards." *Id.* "Therefore the SSEB deemed these aircraft acceptable and recommend these aircraft for award." *Id.*

In sum, the SSEB's recommendation was "to AWARD TO ALL OFFERORS." AR 1373. The Agency's final award decisions reflect the above SSEB findings. AR 1378 (Aero Spray evaluation summary, noting that "two of the aircraft require minor equipment items to be installed prior to inspection, carding, and performance under this contract" and that "[t]he offeror provided sufficient information in the proposal to properly evaluate these two aircraft"); AR 1378 (Fletcher evaluation summary, noting that "both aircraft require minor equipment items to be installed prior to inspection, carding, and performance under this contract[,]" that "[s]ufficient information was provided in the proposal

to properly evaluate these two aircraft[,]" and that "[t]he technical evaluators confirmed that installation of the floats and other minor equipment items are typical in the industry and fully expect the offeror to complete the configuration in time for performance"); AR 1379 (Henry's Aerial evaluation summary, making similar findings, and noting that "[t]he offeror provided sufficient information in the proposal to properly evaluate all four aircraft" and that because "all four aircraft met or exceeded the minimum requirements, [t]he SSEB determined all four aircraft as Acceptable").

With respect to pricing, the Agency determined that "the strong competition in an acceptable range among the offers validates the pricing as reasonable." AR 1384. The Agency recognized that Fletcher Flying and Henry's Aerial both "indicated [an] intention to offer [* * *] with [* * *] since they're coming into the amphibious scooping specialty of the SEAT [* * *], hoping to earn ample volumes of service opportunities and build strong past performance for a prospective and beneficial future." *Id.* [7]

7 SEAT stands for "Single Engine Air Tanker." AR 334 (Contract Acronyms).

***5** In sum, the Agency concluded:

> Proposals from Aero Spray — Dauntless, Air Spray, Fletcher Flying, and Henry's Aerial consisting of a combined total of 26 offered aircraft met or exceeded the minimum requirements stated in the solicitation for all three non-priced factors. Eight of the 26 aircraft need to be final-configured for service prior to inspection, carding, and performance on resultant contracts. The SSEB has high confidence all offered aircraft will be complete and configured to contract specification in time for contract performance. Pricing for all offerors is determined fair and reasonable. ...

AR 1385.

D. Procedural History

On March 18, 2021, Aero Spray filed its initial complaint against the United States in this Court, ECF No. 1, and amended its complaint on April 2, 2021. ECF No. 20 ("Am. Compl."). In the amended complaint, Aero Spray alleges that the Agency awarded IDIQ contracts to Henry's Aerial and Fletcher Flying despite the fact that neither proposed FireBoss aircrafts compliant with the RFP's putative "in contract configuration" requirement at the time of proposal submission. Am. Compl. ¶¶ 10–13, 36–37, 50. Aero Spray contends that while it "spent significant funds" to comply with this alleged requirement, Henry's Aerial and Fletcher Flying were able to "decrease[ ] the total cost of their offers" by ignoring it. *Id.* ¶¶ 62, 63.

On April 9, 2021, the government filed the administrative record ("AR") in this matter. ECF No. 21. On May 11, 2021, Aero Spray filed its motion for judgment on the administrative record. ECF No. 34 ("Pl. MJAR"). On that same day, the government and Defendant-Intervenors, Henry's Aerial and Fletcher Flying, each filed their respective motion to dismiss or, in the alternative, a motion for judgment on the administrative record. ECF Nos. 31 ("Henry's MJAR"), 32 ("Fletcher MJAR"), 33 ("Def. MJAR"). The parties filed timely response briefs. ECF Nos. 37 ("Henry's Resp."), 38 ("Def. Resp."), 39 ("Fletcher Resp."), 40 ("Pl. Resp."). On June 17, 2021, the Court held oral argument. ECF Nos. 36, 47 ("Tr.").

Following oral argument, the Court directed the government to produce an affidavit from the cognizant contracting officer regarding the status of Defendant-Intervenors' proposed aircrafts and provided the parties an opportunity to file motions to supplement the administrative record with relevant information regarding their proposed aircrafts. ECF No. 42. The parties filed their respective supplemental briefs. ECF Nos. 44 ("Henry's Supp. Br."), 45 ("Pl. Supp. Br."), 49 ("Def. Supp. Br."). Both Henry's Aerial and Aero Spray moved to supplement the record; the government opposes Aero Spray's motion. Def. Supp. Br. at 4.

II. AERO SPRAY LACKS STANDING TO PROTEST THE CONTRACT AWARDS MADE TO DEFENDANT-INTERVENORS

[1] **[2]** A threshold issue in this case is whether Aero Spray, as an awardee of one of the multiple award IDIQ contracts,

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has standing to challenge DOI's additional contract awards to Henry's Aerial and Fletcher Flying. *Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002) ("[S]tanding is a threshold jurisdictional issue."). "The party invoking federal jurisdiction bears the burden of establishing standing." *CliniComp Int'l, Inc. v. United States*, 904 F.3d 1353, 1358 (Fed. Cir. 2018) (citing *Myers*, 275 F.3d at 1369). Where a plaintiff lacks standing, its case must be dismissed pursuant to RCFC 12(b)(1). *Media Techs. Licensing, LLC v. Upper Deck Co.*, 334 F.3d 1366, 1370 (Fed. Cir. 2003) ("Because standing is jurisdictional, lack of standing precludes a ruling on the merits."). The government and Defendant-Intervenors argue that Aero Spray, having received a contract award, lacks standing to challenge the separate awards to its competitors. *See* Def. MJAR at 19–28; Henry's MJAR at 18–21; Fletcher MJAR at 24–31. The Court agrees — at least given the facts of this case — but the underlying issue is far from simple.

A. General Article III Standing Principles

***6** **[3]** **[4]** "We begin with the most basic doctrinal principles: Article III, § 2, of the Constitution restricts the federal 'judicial Power' to the resolution of 'Cases' and 'Controversies.' That case-or-controversy requirement is satisfied only where a plaintiff has standing." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273, 128 S.Ct. 2531, 171 L.Ed.2d 424 (2008); *see Dep't of Com. v. New York*, —— U.S. ——, 139 S. Ct. 2551, 2565, 204 L.Ed.2d 978 (2019) ("For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue."); *WiAV Sols. LLC v. Motorola, Inc.*, 631 F.3d 1257, 1263–64 (Fed. Cir. 2010) ("Article III, § 2 of the Constitution limits the jurisdiction of federal courts to 'Cases' or 'Controversies.' The doctrine of constitutional standing serves to identify which disputes fall within these broad categories and therefore may be resolved by a federal court."). [8]

8 "Our cases involving non-Article III tribunals have held that these courts exercise the judicial power of the United States." *Freytag v. Comm'r*, 501 U.S. 868, 889, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). "The Court of Federal Claims, though an Article I court, 28 U.S.C. § 171 (2000), applies the same standing requirements enforced by other federal courts created under Article III." *Anderson v. United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003); *see also* 28 U.S.C. § 2519 (empowering the Court of Federal Claims to enter final judgments in any "claim, suit, or demand against the United States arising out of the matters involved in the case or controversy").

[5] **[6]** **[7]** **[8]** **[9]** **[10]** The United States Supreme Court has "established that the 'irreducible constitutional minimum' of standing consists of three elements[,]" including that the plaintiff allege facts demonstrating that it: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). As noted above, a plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). Injury in fact is a constitutional requirement, and "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997), *quoted in Spokeo*, 578 U.S. at 339, 136 S.Ct. 1540. To establish injury in fact, a plaintiff must show that it suffered "an invasion of a legally protected interest" that is "concrete and particularized" and " 'actual or imminent, not conjectural or hypothetical.' " *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). [9] Thus, "Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, [a plaintiff] could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Spokeo*, 578 U.S. at 341, 136 S.Ct. 1540. [10]

9 "The Supreme Court has not defined the term 'legally protected interest' as it pertains to Article III standing, nor has it clarified whether the term does any independent work in the standing analysis." *Cottrell v. Alcon Lab'ys.*, 874 F.3d 154, 163 (3d Cir. 2017); *see also In re Special Grand Jury 89-2*, 450 F.3d 1159, 1172 (10th Cir. 2006) ("The term *legally protected interest* has generated some confusion because the Court has made clear that a plaintiff can have standing despite losing on the merits — that is, even though the interest would not be protected by the law in that case."). In that regard, "[t]he Wright & Miller treatise

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criticizes the phrase 'legally protected interest' on the ground that it seems to beg the question of the legal validity of the claim and therefore 'provide[s] ample opportunity for mischief' given 'the common tendency to use standing concepts to address the question whether the plaintiff has stated a claim.' " *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 n.3 (10th Cir. 2006) (*en banc*) (quoting 13 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3531.4 (2d ed. Supp. 2005)); *see also Info. Handling Servs., Inc. v. Def. Automated Printing Servs.*, 338 F.3d 1024, 1030 (D.C. Cir. 2003) (noting that, on a motion to dismiss, "a plaintiff's *non-frivolous* contention regarding the meaning of a statute must be taken as correct for purposes of standing," lest the court "effectively be deciding the merits under the guise of determining the plaintiff's standing" (emphasis added)); *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997) (concluding that only "if the plaintiff's claim has no foundation in law" does the plaintiff have "no legally protected interest and thus no standing to sue"). In any event, "the Supreme Court has repeatedly recognized that financial or economic interests are 'legally protected interests' for the purposes of the standing doctrine." *Cottrell*, 874 F.3d at 164.

10 *See also Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation ... is insufficient to create Article III standing.").

***7** **[11]** Congress may enact statutes that provide would-be plaintiffs with standing subject only to the constraints of Article III itself; alternatively, Congress may impose heightened standing requirements. *See, e.g.*, *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177, 131 S.Ct. 863, 178 L.Ed.2d 694 (2011) (concluding that statutory term granting standing to a "['person] aggrieved' must be construed more narrowly than the outer boundaries of Article III" while rejecting the argument "[a]t the other extreme ... that 'person aggrieved' ... is a term of art that refers only to the employee who engaged in the protected activity"). [11]

11 *See also WiAV Sols.*, 631 F.3d at 1264–65 (explaining that "[o]ften a statute creates the necessary legally protected interest" and holding that "[b]ecause the Patent Act creates the legally protected interests in dispute, the right to assert infringement of those interests comes from the Act itself"); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979) (noting that while "Congress may, by legislation, expand standing to the full extent permitted by Art. III[,] ... [i]n no event, however, may Congress abrogate the Art. III minima").

B. Administrative Procedure Act ("APA") Standing Principles

[12] **[13]** The APA [12] provides standing almost to the limits of Article III, as follows: "[a] person ... adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA standing test is not particularly stringent. *See, e.g.*, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225, 132 S.Ct. 2199, 183 L.Ed.2d 211 (2012). While the Supreme Court "has long held that a person suing under the APA must satisfy not only Article III's standing requirements," but also must assert an interest " 'arguably within the zone of interests to be protected or regulated by the statute' " or regulation allegedly violated, that latter "prudential standing test ... 'is not meant to be especially demanding.' " *Id.* at 224–25, 132 S.Ct. 2199 (first quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); and then quoting *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987)). [13]

12 Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

13 *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225, 132 S.Ct. 2199 ("[W]e have always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff."); *cf. Bennett v. Spear*, 520 U.S. 154, 163, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) ("We have made clear, however, that the breadth of the zone of interests varies according to the provisions of law at issue ....").

Indeed, the Supreme Court has instructed courts to apply the APA's standing test "in keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.' " *Match-E-Be-Nash-She-Wish*,

567 U.S. at 225, 132 S.Ct. 2199 (quoting *Clarke*, 479 U.S. at 399, 107 S.Ct. 750, for both that proposition and for the idea that the Court does "not require any 'indication of congressional purpose to benefit the would-be plaintiff' "). [14] Thus, the APA's standing "test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.' " *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225, 132 S.Ct. 2199 (quoting *Clarke*, 479 U.S. at 399, 107 S.Ct. 750). [15]

14 *See also Dep't of Com. v. New York*, —— U.S. ——, 139 S. Ct. 2551, 2567, 204 L.Ed.2d 978 (2019) ("The [APA] embodies a 'basic presumption of judicial review' " (quoting *Abbott Lab'ys. v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967))).

15 Importantly, and as discussed *infra*, long before Congress vested this Court with exclusive jurisdiction over the actions defined in 28 U.S.C. § 1491(b), the APA provided standing for plaintiffs to challenge an agency's procurement actions. *See Scanwell Lab'ys., Inc. v. Shaffer*, 424 F.2d 859, 861–73 (D.C. Cir. 1970).

***8** In this case, Aero Spray's alleged injury in fact is the economic harm from increased future competition for individual task orders resulting from the allegedly improper IDIQ contract awards to Defendant-Intervenors. Am. Compl. ¶¶ 12, 14–15. Such future injuries "may suffice [for standing purposes] if the threatened injury is 'certainly impending,' or there is a ' "substantial risk" that the harm will occur.' " *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (quoting *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 414 n.5, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013)), *quoted in Dep't of Com. v. New York*, —— U.S. ——, 139 S. Ct. 2551, 2565, 204 L.Ed.2d 978 (2019); *see also TransUnion LLC v. Ramirez*, —— U.S. ——, 141 S. Ct. 2190, 2210, 210 L.Ed.2d 568 (2021) ("As this Court has recognized, a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." (citing *Clapper*, 568 U.S. at 414 n.5, 133 S.Ct. 1138 (2013))).

The United States Court of Appeals for the District of Columbia Circuit has held that alleged harm from increased competition for government research grants — a factual scenario analogous to a procurement competition — can provide both Article III and APA standing. *Sherley v. Sebelius*, 610 F.3d 69, 72, 74–75 (D.C. Cir. 2010) ("We see no reason any one competing for a governmental benefit should not be able to assert competitor standing when the Government takes a step that benefits his rival and therefore injures him economically."). [16] Courts have applied similar reasoning in other contexts. *See, e.g.*, *Washington All. of Tech. Workers v. Dep't of Homeland Sec.*, 892 F.3d 332, 341 (D.C. Cir. 2018) (plaintiff had standing where "injury claimed is exposure to increased competition in the STEM labor market"); *cf. Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 737–38 (5th Cir. 2016) ("numerous courts have upheld the standing of competitors to challenge official actions that change the amount of competition in an economic actor's market").

16 *See also Sherley*, 610 F.3d at 74 ("Because the Guidelines have intensified the competition for a share in a fixed amount of money, the plaintiffs will have to invest more time and resources to craft a successful grant application. That is an actual, here-and-now injury.").

The Federal Circuit has followed the D.C. Circuit's "competitor standing" jurisprudence in other contexts, explaining that "[a]lthough the doctrine of 'competitor standing' is not yet well-developed in our Circuit, we note that the D.C. Circuit repeatedly has applied the doctrine to hold that 'parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition.' " *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1333 (Fed. Cir. 2008) (quoting *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998), citing other D.C. Circuit decisions, and holding that a plaintiff had competitor standing). [17]

17 On the other hand, answering the question of whether a particular statutory provision actually " 'protect[s] [a] competitive interest' ... 'goes to the merits' of a plaintiff's claim, not to his Article III standing." *Sherley*, 610 F.3d at 72 (quoting *Ass'n of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 153, 90 S.Ct. 827 (1970)).

C. "Interested Party" Standing in Actions Pursuant to 28 U.S.C. § 1491(b)

Aero Spray's action is brought pursuant to 28 U.S.C. § 1491(b). If the APA standing inquiry governed § 1491(b) actions, this Court would have little trouble finding that Aero Spray has standing to challenge the contract awards to Defendant-Intervenors. Whether Aero Spray has standing in this case is complicated, however, by the Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 ("ADRA"), which defines not only this Court's jurisdiction over *what* actions may be brought against the government, but also *who* has standing to pursue them.

***9** The Tucker Act's plain language provides that an "interested party" may file an "action" in this Court "objecting [1] to a solicitation by a Federal agency for bids or proposals for a proposed contract *or* [2] to a proposed award *or* [3] the award of a contract *or* [4] any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1) (emphasis and alterations added); *see Tolliver Grp., Inc. v. United States*, 151 Fed. Cl. 70, 84 & n.11 (2020). [18]

18 Section 1491(b) actions are typically referred to as "bid protests." *Tolliver*, 151 Fed. Cl. at 95-99 ("[A]lthough 'ADRA covers *primarily* pre- and post-award bid protests,' the Federal Circuit in *RAMCOR* explicitly reversed this Court's determination 'that a [plaintiff] could only invoke § 1491(b)(1) jurisdiction by including in its action an attack on the merits of the underlying contract award' or the solicitation." (quoting *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999) (emphasis added))).

Were this Court unconstrained by Federal Circuit precedent, the first step in the standing analysis would be to determine whether the statutory term "interested party" imports the fairly permissive APA standing requirements or defines a more limited plaintiff class. The interpretive problem, in that regard, is that 28 U.S.C. § 1491(b) "provides no definition of the term 'interested party' " and thus "[i]t is unclear whether section 1491(b)(1) adopts the liberal APA standing requirement set forth in section 702 of the APA or whether it adopts the more restrictive standard set forth in 31 U.S.C. § 3551(2)[,]" which applies in bid protests before the Government Accountability Office ("GAO"). *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1333–34 (Fed. Cir. 2001).

We do not need to speculate about the answer; for better or worse, binding Federal Circuit precedent has resolved the issue. In *American Federation of Government Employees v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) ("*AFGE*"), the Federal Circuit first interpreted the term "interested party" to have the same definition as "interested party" in the Competition in Contracting Act of 1984 ("CICA"), Pub. L. No. 98-369, div. B, tit. VII, § 2701, 98 Stat. 494, 1175 (1984), which governs the bid protest jurisdiction of the GAO, *see* 31 U.S.C. §§ 3551–56. CICA, in turn, defines the term "interested party" as "[1] an actual or prospective bidder or offeror whose [2] direct economic interest [3] would be affected by [4] the award of the contract or by failure to award the contract." 31 U.S.C. § 3551(2) (emphasis added). In adopting that definition for the purposes of § 1491(b), the Federal Circuit was "not convinced that Congress ... intended to confer standing on anyone who might have standing under the APA." *AFGE*, 258 F.3d at 1302 (concluding that while 31 U.S.C. § 3551(2) "by its own terms, applies only to [GAO protests] ..., the fact that Congress used the same term in § 1491(b) as it did in the CICA suggests that Congress intended the same standing requirements that apply to protests brought under the CICA to apply to actions brought under § 1491(b)(1)"). [19]

19 The Court, accordingly, agrees with the government that any "reliance on cases that analyze standing under the APA sheds little light on the question before this Court because the Federal Circuit has already explicitly considered — and rejected — the notion that the Tucker Act and the APA have the same standing requirements." Def. Resp. at 4.

***10** To properly understand the rationale and ramifications of the Federal Circuit's decision in *AFGE*, some historical context is necessary. Prior to ADRA, the district courts possessed APA jurisdiction over challenges to the procurement process; such jurisdiction is referred to as "*Scanwell* jurisdiction" after the case recognizing it. *See Scanwell Lab'ys., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). The Federal Circuit in *AFGE* acknowledged that part of the difficulty in defining the term "interested party" arises from the fact that while ADRA's legislative history reflects some intent to transfer the jurisdiction over *Scanwell* claims to the Court of Federal Claims, the legislative history does not provide clear guidance as to Congress's understanding of the breadth of the *Scanwell* doctrine. 258 F.3d at 1301. In particular, the legislative history does not demonstrate:

(1) whether Congress intended to limit ADRA's coverage to claims "brought by disappointed bidders" challenging the solicitation or award of a federal contract — because such claims constituted "[t]he vast majority of cases brought pursuant to *Scanwell*"; *or* (2) whether Congress "intended to give the Court of Federal Claims jurisdiction over any contract dispute that could be brought under the APA"— because "*Scanwell* itself [wa]s based on the APA." *Id.* The Federal Circuit went with the former, and accordingly "interpret[ed] the references in [ADRA's] legislative history to the '*Scanwell* jurisdiction' of the district courts as references to [their] jurisdiction over bid protest cases brought under the APA *by disappointed bidders*, like the plaintiff in *Scanwell*." *Id.* at 1301–02 (emphasis added).

[14] In other words, notwithstanding that *Scanwell* jurisdiction, in general, was nothing more than a particular instantiation of APA jurisdiction, providing a wide variety of plaintiffs with standing to file suit, [20] the Federal Circuit held that 28 U.S.C. § 1491(b) permitted protest-type claims only by a more limited class of injured parties (*i.e.*, "disappointed bidders"). In *Banknote Corp. of America v. United States*, for example, the Federal Circuit explained that while "[u]nder the more liberal APA standard, parties other than actual or prospective bidders might be able to bring suit[,]" the appellate court in *AFGE* "concluded that Congress intended standing under the ADRA to be *limited to disappointed bidders*." 365 F.3d 1345, 1351 (Fed. Cir. 2004) (emphasis added) (discussing *AFGE*, 258 F.3d at 1301-02). Accordingly, "[a] party seeking to establish jurisdiction under § 1491(b)(1) must show that it meets § 1491(b)(1)'s standing requirements, which are 'more stringent' than the standing requirements imposed by Article III of the Constitution." *Diaz v. United States*, 853 F.3d 1355, 1358 (Fed. Cir. 2017) (quoting *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009)).

20 *See Validata Chem. Servs. v. Dep't of Energy*, 169 F. Supp. 3d 69, 85 (D.D.C. 2016) (citing *Bayou State Sec. Servs. v. Dravo Util., Inc.*, 674 F.2d 325, 326–28 (5th Cir. 1982), *Am. Dist. Tel. v. Dep't of Energy*, 555 F. Supp. 1244, 1245–48 (D.D.C. 1983), *Lombard Corp. v. Resor*, 321 F. Supp. 687, 688–91 (D.D.C. 1970), and noting, for example, that "district courts did entertain challenges by subcontractors to subcontract procurements under the *Scanwell* doctrine prior to enactment of ADRA").

CICA's definition of "interested party" naturally begs yet further questions, particularly in the context of 28 U.S.C. § 1491(b). What are the parameters of an "actual or prospective bidder"? How does the definition of "interested party" apply in a pre-award challenge to a solicitation, as compared to in a post-award challenge to the award of a contract? Of particular import in this case, does "interested party" include a contract awardee that nevertheless objects to some other aspect of the government's procurement process? Does the definition need to be adjusted for an action challenging "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement," which need not involve an underlying attack on a solicitation or contract award? [21] What constitutes a "direct economic interest"? Finally, what effect did ADRA's sunset provision [22] have on the district courts' *Scanwell* jurisdiction (*i.e.*, may non-interested parties with APA standing still maintain procurement-related actions in a district court)? [23]

21 *See supra*, note 18; *see also Validata*, 169 F. Supp. 3d at 77 (citing Matthew H. Solomson & Jeffrey L. Handwerker, *Subcontractor Challenges to Federal Agency Procurement Actions*, 06-3 Briefing Papers 1, 4 (Feb. 2006) (arguing that "*AFGE's* applicability arguably may be limited to the first two prongs of the Tucker Act ... particularly in light of *AFGE's* failure to discuss a *RAMCOR*-type suit")).

22 At the time ADRA was enacted in 1996, that statute granted the federal district courts and the Court of Federal Claims concurrent jurisdiction over the procurement-related actions described in 28 U.S.C. § 1491(b). That changed, however, in 2001, when ADRA's sunset provision eliminated the jurisdiction of the federal district courts and vested the Court of Federal Claims with exclusive jurisdiction over such cases. *See* Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875 (1996) (codified at 28 U.S.C. § 1491 note).

23 These questions, and perhaps others, fairly call into question whether the Federal Circuit's definition of "interested party" in the Tucker Act, as modified by ADRA, should be revisited by the Federal Circuit *en banc*. In that regard, the United States District Court for the District of Columbia has criticized the Federal Circuit's adoption of CICA's definition of "interested party" because "[t]here is no evidence

that Congress intended to leave jurisdiction over these *Scanwell* claims in the federal district courts, while vesting the Court of Federal Claims with exclusive jurisdiction over a narrower subset of *Scanwell* claims." *Validata*, 169 F. Supp. 3d at 85. The district court also noted — correctly, in the undersigned's view — that "any arguable parallel between CICA and ADRA breaks down ... where the plaintiff's cause of action falls under the [last] prong of ADRA's 'objecting to' test, which does not require that the plaintiff object to a federal contract solicitation or award." *Id.* at 84; *see also id.* at 81–82 (explaining that protest categories recognized in CICA do not "parallel" ADRA's prongs and noting that "[i]f this language were read to apply only to disappointed bidders, it is difficult to imagine what work the 'in connection with' clause would perform beyond the first two prongs of ADRA's 'objecting to' test, which already permit challenges by those 'objecting to' federal contract solicitations or awards."). Only if ADRA "is construed to encompass the full range of APA claims previously pursued under the *Scanwell* doctrine — including claims by a plaintiff who is not a disappointed bidder within the meaning of CICA but who possesses standing under the broader standing rule of § 702 of the APA — the 'in connection with' clause has independent import." *Id.* at 82. Finally, the district court pointed out that the Federal Circuit's adoption of CICA's "interested party" definition undermines the congressional purpose in creating an exclusive, consolidated forum for procurement-related disputes:

> Nor is the Court convinced that the Federal Circuit was correct to adopt the narrower CICA standard .... The relevant question is not *whether* Validata can bring suit, but *where* it must do so. ADRA is both jurisdiction-conferring and, by implication, jurisdiction-denying. Thus, by reading the provision narrowly, the Federal Circuit limited the jurisdiction of the Court of Federal Claims but arguably expanded the jurisdiction of the federal district courts across the country. This is because, as discussed above, *Scanwell* recognized that the APA confers standing on any aggrieved person to challenge an unlawful or arbitrary agency action, including in procurement cases. Under one view of ADRA, adopted here, Congress transferred jurisdiction over all APA procurement cases to the Court of Federal Claims, while under the other view, arguably adopted in *AFGE*, Congress transferred jurisdiction only over claims brought by disappointed bidders on federal contracts. Yet, either way, ADRA cannot reasonably be construed to have wholly abolished APA procurement claims that might otherwise have been brought under *Scanwell*. The difference between the two constructions is simply whether jurisdiction over some claims remains in the district courts or whether all such claims must now be brought in the Court of Federal Claims.
>
> *Id.* at 84 (internal citations omitted); *see also SEKRI, Inc. v. United States*, 152 Fed. Cl. 742, 750 (2021) (suggesting that "[d]espite not being an actual or prospective bidder, SEKRI may have legal resource beyond this court's jurisdiction" and citing *Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 910–11 (10th Cir. 2004), which held that the district courts retain jurisdiction "to hear cases challenging the government's contract procurement process so long as the case is brought by someone other than the actual or potential bidder").

***11** Following *AFGE*, the Federal Circuit continued to refine its bid protest jurisprudence, definitively resolving some of the foregoing questions. For example, to satisfy the "direct economic interest" component of the "interested party" definition, the Federal Circuit held that a plaintiff's allegations must demonstrate a particular type of prejudice: a plaintiff "must establish that it had a *substantial chance of securing the award* in order to establish standing[.]" *Myers Investigative & Sec. Servs.*, 275 F.3d at 1369–70 (emphasis added) (summarizing earlier decisions); *see also Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003) ("As we said in *Myers*, 'prejudice (or injury) is a necessary element of standing.' " (quoting *Myers*, 275 F.3d at 1370)); *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1308 (Fed. Cir. 2006) (concluding that to demonstrate "the requisite direct economic interest" a plaintiff "is required to establish that it had a 'substantial chance' of receiving the contract"); *COMINT Sys. Corp. v. United States*, 700 F.3d 1377, 1383 (Fed. Cir. 2012) ("The [standing] question whether a protester 'ha[s] a substantial chance of securing the award,' *Myers*, 275 F.3d at 1370, turns on whether the protester would have had a substantial chance if not for the alleged errors."); *cf. Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1582 (Fed. Cir. 1996) (providing that the "substantial chance" standard for "competitive prejudice" — on the merits

— requires the protesting party to "establish not only some significant error in the procurement process, but also that there was a substantial chance it would have received the contract but for that error"). This is the exclusive standard applied in post-award protests and this Court is not aware of, nor do the parties provide an example of, the Federal Circuit's having adopted another formulation in that context.

The Federal Circuit, however, modified that post-award standing test for pre-award cases. In the typical pre-award case (*e.g.*, challenges to a request for information ("RFI") [24] or to a solicitation's legality), applying the "substantial chance" test makes little or even no sense because an agency is in the early stages of the procurement process and potential offerors have not even submitted proposals yet. In *Weeks Marine, Inc. v. United States*, 575 F.3d 1352 (Fed. Cir. 2009), for example, the government historically had awarded certain contracts using competitive sealed bidding procedures but then changed its procurement method to a negotiated IDIQ procurement for the new contracts. *Id.* at 1355–56. A prospective offeror filed an action in this Court, challenging the agency's use of the new approach. *Id.* On appeal, the Federal Circuit addressed the plaintiff's standing:

> We have not had occasion to discuss what is required to prove an economic interest, and thus prejudice, in a case such as this, where a prospective bidder/offeror is challenging a solicitation in the pre-award context. In such a case, it is difficult for a prospective bidder/offeror to make the showing of prejudice that we have required in post-award bid protest cases. *See, e.g., Statistica,* 102 F.3d at 1582 (holding that a contractor lacked standing because it failed to show a "substantial chance it would have received the contract award but for" agency error). The reason of course is that, in a case such as this, there have been neither bids/offers, nor a contract award. Hence, there is no factual foundation for a "but for" prejudice analysis. However, Article III considerations require a party such as Weeks to make a showing of *some* prejudice.

Weeks Marine, 575 F.3d at 1361 (some citations omitted). In attempting to "strike[ ] the appropriate balance between the language of § 1491(b)(1) ... and Article III standing[,]" the Federal Circuit concluded that it is sufficient for a pre-award protestor merely to allege a "non-trivial competitive injury which can be addressed by judicial relief." *Id.* at 1362. This language is best understood as simply carving out a narrow exception to the general "substantial chance" standard applicable in post-award cases, rather than as creating a new standard. That is because the primary point of *Weeks Marine* was to define more precisely the proper standing inquiry in pre-award cases, and, in particular, to avoid any tension with the *Blue & Gold* waiver rule. [25]

24 *See, e.g.*, *Distributed Sols., Inc. v. United States*, 539 F.3d 1340, 1346 (Fed. Cir. 2008) (holding that the government's use of "an RFI to solicit information from outside vendors ... to determine the scope of services required by the government" constitutes a pre-procurement decision subject to protest because 28 U.S.C. § 1491(b) "does not require an actual procurement").

25 In *Blue & Gold Fleet, L.P. v. United States*, the Federal Circuit held that a plaintiff waives a solicitation challenge if the plaintiff could have raised an objection prior to the due date for proposals but only files a protest after the contract award. 492 F.3d 1308, 1313 (Fed. Cir. 2007). Considering that waiver rule, the Federal Circuit in *Weeks Marine* recognized that it "would be anomalous" were the court "to hold that Weeks cannot now challenge the ... solicitation in the Court of Federal Claims" because "we effectively would be saying that this court has set up a judicial scheme whereby a party runs afoul of the waiver rule if it waits to challenge a solicitation (as Blue & Gold did), but is properly dismissed on standing grounds if it raises the challenge pre-award (as Weeks has done)." 575 F.3d at 1363. Accordingly, *Weeks Marine* held that a "prospective bidder or offeror must establish 'a non-trivial competitive injury which can be redressed by judicial relief' to meet the standing requirement of § 1491(b)(1)." *Id.* (adopting and quoting the prejudice standard formulated in *WinStar Commc'ns., Inc. v. United States*, 41 Fed. Cl. 748, 763 (1998)).

***12** We cannot lose sight of what the Federal Circuit was trying to "balance." *Weeks Marine*, 575 F.3d at 1362. The issue was that, on the one hand, the Federal Circuit already had concluded that CICA's "interested party" definition imposed a substantially higher burden than Article III to demonstrate prejudice for the purposes of satisfying the "direct economic interest" requirement. Because a "but for" test is unworkable in a pre-award suit, the Federal Circuit nudged the test closer to Article III. But, there is no indication in that decision or any other Federal Circuit decision that allegations demonstrating a cognizable injury in fact for purposes of Article III should be permitted to overwhelm,

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or somehow substitute for, the requirement for a proper plaintiff to be an "actual or prospective bidder." In other words, the type of cognizable economic prejudice remained that which belongs in the category of "disappointed bidder" pursuant to *AFGE*; that is, a party whose stake in winning the procurement has been negatively impacted.

Even after *Weeks Marine*, the "substantial chance" test remains the default standard. Indeed, the Federal Circuit repeatedly has held that *even in the pre-award context*, if there is a factual basis for conducting a "substantial chance" analysis, a protester cannot merely allege a "non-trivial competitive injury." In *Orion Technology, Inc. v. United States*, 704 F.3d 1344 (Fed. Cir. 2013), for example, the Federal Circuit applied the "substantial chance" test where the plaintiff submitted a late proposal and omitted material information necessary for the agency's cost realism analysis. *Id.* at 1348. In rejecting the plaintiff's arguments that it was only required to show a "non-trivial competitive injury" given the pre-award context, the Federal Circuit explained that "[i]n *Weeks Marine,* we set out an exception to the general standing test in the case of *pre-bid*, pre-award protests because at that stage it is difficult, if not impossible, to establish a substantial chance of winning the contract prior to the submission of any bids" but that "[g]iven the circumstances, there is an adequate factual predicate to ascertain under the traditional 'substantial chance' standard whether [the plaintiff] was prejudiced by the [agency's] decision to exclude its initial proposal." *Id.* at 1348–49 (emphasis added).

Similarly, *Oracle America, Inc. v. United States*, 975 F.3d 1279 (Fed. Cir. 2020), involved a pre-award protest, and the Federal Circuit rejected the plaintiff's argument that in all such protests a plaintiff need only allege facts showing a non-trivial competitive injury to establish standing. In rejecting this argument, the Federal Circuit applied *Orion Technology*, explaining:

> In some pre-award cases, we have used the 'non-trivial competitive injury' test "because there is an inadequate factual foundation for performing a 'substantial chance' test." *Orion Tech., Inc. v. United States*, 704 F.3d 1344, 1348 (Fed. Cir. 2013). In this case, however, there was an adequate factual predicate to apply the "substantial chance" test.

Oracle, 975 F.3d at 1291 n.3; *see also Savantage Fin. Servs., Inc. v. United States*, 150 Fed. Cl. 307, 328 (2020) (holding, in pre-award protest, that "this case presents an appropriate factual basis to support the application of the *Oracle* test for showing prejudice because the record is sufficiently developed to ... demonstrate that [the plaintiff] would [not] have a 'substantial chance' of being awarded the ... contract").

As discussed in more detail below, the Court will not apply the "non-trivial competitive injury" test outside of the limited factual circumstances where the Federal Circuit has found that it applies.

D. Aero Spray Is Not an "Interested Party" with Respect to the Challenged Contract Awards

Aero Spray urges this Court to apply the relaxed, pre-award *Weeks Marine* test here and, accordingly, hold that Aero Spray has standing to have its claims decided on the merits. Pl. Resp. at 14–16. Defendant and Defendant-Intervenors, in contrast, argue that, as this is a post-award protest, this Court must apply the traditional post-award "substantial chance" standing test. Def. MJAR at 36–37; Fletcher MJAR at 27–31; Henry's MJAR at 18–19. Aero Spray's position is not devoid of merit, particularly given that it relies primarily on a well-reasoned decision of one of this Court's distinguished jurists: *National Air Cargo Group, Inc. v. United States*, 126 Fed. Cl. 281 (2016) (Lettow, J.) — a decision that gives the Court considerable pause. Nevertheless, after further consideration, the Court concludes that no matter how it slices the standing inquiry here, Aero Spray is not an interested party, under either Federal Circuit test, with respect to the contract awards made to Defendant-Intervenors.

***13** Before diving into the rationale for that conclusion, the Court must properly frame the standing question. The "interested party" question focuses on *who* is a proper plaintiff to maintain such an action under § 1491(b). While the answer to that question may vary based upon the precise nature of the action, the Federal Circuit has never broadened the definition of "interested party" to include a plaintiff in Aero Spray's position. In this case, the Court holds that Aero Spray does not allege facts demonstrating: (1) that it is "an actual or prospective bidder or offeror"; or (2) the type of cognizable prejudice in the procurement process sufficient to constitute an "affected" "direct economic interest." The parties' debate regarding the *Weeks Marine* test is relevant only to the required prejudice — the "direct economic interest" prong of the "interested party" definition — which, in any case, Aero Spray cannot meet in the factual context of this procurement.

To explain the Court's reasoning, we return, once again, to CICA's definition of "interested party." CICA defines that term as follows:

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> (2) The term "interested party"—
>
> (A) *with respect to a contract* or a solicitation or other request for offers *described in paragraph (1)*, means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract[.]

31 U.S.C. § 3551(2) (emphasis added). Paragraph (1) of that same statutory provision — referenced in the definition of "interested party" — in turn defines the term "protest" as:

> a written objection by an interested party to any of the following:
>
> (A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.
>
> (B) The cancellation of such a solicitation or other request.
>
> (C) *An award* or proposed award *of such a contract*. [26]

31 U.S.C. § 3551(1) (emphasis added).

26 Sec. 3551(1) includes two other grounds for objection, neither of which is relevant here: "[a] termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract" and "[c]onversion of a function that is being performed by Federal employees to private sector performance. 31 U.S.C. § 3551(1)(D), (E).

[15] **[16]** Read in context, [27] and considering the entire provision, CICA's definition of "interested party" leads the Court to conclude that Aero Spray does not qualify as an "actual or prospective" offeror and thus lacks standing to challenge the contract awards to Defendant-Intervenors. That is because the statute defines the term "interested party" only "*with respect to a contract* or a solicitation or other request for offers *described in paragraph (1)*." 31 U.S.C. § 3551(2)(A) (emphasis added). That phrase may be easily overlooked but it provides a meaningful textual clue: who (or what) qualifies as an "interested party" depends upon the nature of the "objection." This case, for example, involves neither an objection to a solicitation nor an objection to the cancellation of a solicitation. Rather, the gravamen of Aero Spray's action here involves an objection to "[a]n award ... of such a [procurement] contract." *Id.* § 3551(1)(C). The question here, thus, is *not* whether Aero Spray is (or, more accurately, *was*) an "an actual ... offeror" *generally* for the procurement at issue, but rather whether Aero Spray was an actual offeror "with respect to a contract" award that is the subject of the objection. *Id.* § 3551(1)-(2). The Court concludes that Aero Spray, having received a contract award for all that it proposed, was not, and is not, an actual offeror "with respect to" the other contract awards to which Aero Spray now objects.

27 "We do not construe statutes in a vacuum, and 'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' " *Colonial Press Int'l, Inc. v. United States*, 788 F.3d 1350, 1356 (Fed. Cir. 2015) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989)).

***14** Because this is not a solicitation-related protest, the term "prospective" is not relevant here, as it applies to a timely solicitation challenge filed before proposals are due. *Weeks Marine,* 575 F.3d at 1361-63 (considering "what is required to prove an economic interest, and thus prejudice, in a case such as this, where a prospective bidder/offeror is challenging a solicitation in the pre-award context" and concluding "that in a pre-award protest such as the one before us, [a] prospective bidder or offeror must establish 'a non-trivial competitive injury which can be redressed by judicial relief' " (quoting *WinStar Commc'ns, Inc. v. United States*, 41 Fed. Cl. 748, 763 (1998)). Applying the *Weeks Marine* test here — and this is a critical point — would improperly permit a contract awardee to effectively transform itself back into a *prospective* offeror even though all parties now know the results of the procurement. (There are other reasons the *Weeks Marine* prejudice test should not be applied here, and we revisit that issue *infra.*)

The genesis for the interpretative difficulty is easy to understand. In a typical, single award procurement, the resulting agency decision is necessarily a zero-sum game: one offeror becomes a contract awardee at the expense of any other offerors. In such a case, any disappointed offeror is, by definition, an actual offeror with respect to the only contract award made. The same is true even where a solicitation provides for multiple awards, *see* FAR 16.504(c), where the contemplated multiple awards cover different performance scopes or have materially different features (*e.g.*, different

geographical regions, services, or funding ceilings). In that case, a contract awardee may nevertheless be a disappointed, but actual, offeror with respect to the other awarded contracts where such an awardee also sought, but did not receive, the other awards. That is true whether the disappointed offeror would have preferred a different contract award in lieu of the one received (assuming, of course, that there is a material difference between them) or where the solicitation provided that an actual offeror could receive multiple contract awards (*e.g.*, separate contracts for different regions of the country). [28]

28 *See, e.g.*, *AshBritt, Inc. v. United States*, 87 Fed. Cl. 344, 350–51 (2009) (describing solicitation in which an agency sought contractors "in 10 geographic regions and sub-regions" where "[f]or each region, an [IDIQ] contract would be awarded" and where "[p]rospective offerors were permitted to compete for any region" but noting that "the solicitation imposed geographic limitations on the award of multiple contracts"); *UnitedHealth Mil. & Veterans Servs., LLC v. United States*, 132 Fed. Cl. 529, 533 (2017) ("The solicitation explained that [the agency] would select two different prime contractors even if a potential Contractor submits proposals for more than one contract region and each of the proposals is evaluated as the best value for the Government for the contract region of submission. Although [the agency] intended to award two contracts to two different prime contractors, offerors were permitted to submit proposals on one or both regions." (internal quotation marks omitted)).

[17] **[18]** On the other hand, in a multiple award procurement *where an offeror receives the very contract it sought — i.e.*, the only contract for which it submitted a proposal — that offeror cannot be considered an "actual offeror" with respect to the other contract awards it did not seek (and, indeed, could not have sought). Thus, the general rule is that "[o]nce a party becomes an awardee, they are no longer an 'interested party' with standing to bring a bid protest claim under 28 U.S.C. § 1491(b)." *Looks Great Servs., Inc. v. United States*, 145 Fed. Cl. 324, 328 (2019); *see also TransAtlantic Lines LLC v. United States*, 126 Fed. Cl. 756, 759 (2016) ("[W]here the plaintiff is the awardee of the contract, it no longer has standing under 28 U.S.C. § 1491(b)(1)."); *Kellogg Brown & Root Servs., Inc. v. United States*, 117 Fed. Cl. 764, 769 (2014) *("KBR")* ("[T]he Court agrees with the line of cases holding that when a party brings a challenge in our court to an agency action which affects that party because it is a contractor and not because it is (or might be) an offeror, the only vehicle it may use" is the Contract Disputes Act ("CDA").).

***15** **[19]** "Although most federal contractors were at one point offerors for the contracts they received, once the contracts are awarded their interests in disputes with the government are those of contractors, not offerors." *KBR*, 117 Fed. Cl. at 769. Judge Meyers recently distinguished cases applying that rule as involving "challenge[s] [to] terms of existing contracts rather than challenging an award decision" but nevertheless found jurisdiction where "Plaintiff-Awardees are specifically alleging error in the Government's evaluation and award decisions *that prevented them from obtaining separate awards*." *Sirius Federal, LLC v. United States*, 153 Fed. Cl. 410, 419–420 (2021) (emphasis added) (emphasizing that "there are some significant differences in being awarded a contract as a team lead" as opposed to only "as a team member"). This Court concurs with Judge Meyers, but *Sirius Federal* falls comfortably within the multiple award scenario described above, where a contract awardee may claim it should have won different or additional contract awards. [29] That is, *Sirius Federal* involved a case where a plaintiff sought to secure a contract award that it did not receive, as opposed to Aero Spray, which does not (and cannot) seek any further contract award.

29 *See also KBR*, 117 Fed. Cl. at 769 nn.5–6 (noting that "[t]he only exception" to the awardee-lacks-standing rule involves "challenges to certain corrective action" and citing *Sys. Application & Techs., Inc. v. United States,* 691 F.3d 1374, 1381–82 (Fed. Cir. 2012), for the proposition that "when a proposed corrective action effectively restores an awardee to the status of bidder by requiring it to compete again for a contract award, this action may be challenged by the former awardee in a bid protest").

[20] So, to be clear, the Court in this case does *not* hold that merely labeling a plaintiff an "awardee" is sufficient to conclude that it is not an "interested party" for all purposes. *Sirius Federal*, 153 Fed. Cl. at 419 (rejecting argument that plaintiffs "automatically lack standing because they are members of [Contractor Teaming Arrangement] Teams that won BPA awards"). Rather, as explained above, the Court must look to the contract award that is the subject of the

protest and ask whether the protesting plaintiff is an actual, but disappointed, offeror *for that award*. In this case, however, Aero Spray received a contract award for all the aircraft services that it proposed. Nor does Aero Spray allege either: (1) that the Solicitation contemplates multiple contract awards for the same offeror; or (2) that the government failed to award Aero Spray a contract it should have received. Accordingly, Aero Spray is not an actual offeror for the other awarded contracts.

[21] The Court further (and separately) concludes, but for similar reasons, that Aero Spray's "*direct* economic interest"[30] is unaffected by the awards to Defendant-Intervenors. 31 U.S.C. § 3551(2)(A) (emphasis added). If the more permissive APA standing inquiry applied here, the undersigned readily would agree that harm from future, increased competition (for task orders) would constitute a cognizable injury in fact sufficient to support standing (and, significantly, Aero Spray would not have to qualify as an actual offeror). But, as explained above, that is all legal water under the bridge; the "interested party" standard is more stringent than the APA's standing requirement.[31]

30 *See Diaz v. United States*, 853 F.3d 1355, 1359 (Fed. Cir. 2017) (explaining that the "the instant appeal hinges on the second element of the interested party requirement of the standing inquiry" which is "whether Mr. Diaz possessed a direct economic interest" and that "[i]f he does not possess the requisite direct economic interest, Mr. Diaz would not be an interested party and would not have standing to sue").

31 *Validata*, 169 F. Supp. 3d at 79–80 (explaining that "[t]he test for APA standing ... requires only that the plaintiff meet the traditional requirements of Article III standing" and demonstrate that the asserted interests are "arguably within the zone of interests to be protected or regulated by the statute" allegedly violated (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 224, 132 S.Ct. 2199 (2012))).

***16** In this case, because Aero Spray has received everything to which it is entitled given its proposal and pursuant to the Solicitation, Aero Spray is not a "disappointed bidder" in any sense of that phrase. Even if Aero Spray were correct that the awards to Defendant-Intervenors are somehow improper, Aero Spray would not be entitled to any further contract award. Accordingly, the Court holds that while Aero Spray may have *an* "economic interest" in avoiding future competition, it does not have a "*direct* economic interest ... affected by the award of *the* contract." 31 U.S.C. § 3551(2) (emphasis added). *Cf. Impresa Construzioni Geom. Domenico Garufi*, 238 F.3d at 1334 (holding that a "bid protester ha[s] no economic interest in the outcome" where "if the protest were successful, the award would go to another party").

[22] A veritable tsunami of Federal Circuit decisions addressing the meaning of "direct economic interest" in the context of post-award protests supports this Court's holding that Aero Spray lacks interested party status. The post-award standing test requires that a plaintiff allege facts which, if true, demonstrate that but for the alleged errors in the procurement, the plaintiff would have had a substantial chance of receiving *the challenged contract award at issue*. *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003) (holding that, in a post-award protest, a plaintiff "*must* show that there was a 'substantial chance' it would have received *the contract award* but for the alleged error in the procurement process" (emphasis added), *quoted in Am. Relocation Connections, L.L.C. v. United States*, 789 F. App'x 221, 226 (Fed. Cir. 2019)). Because Aero Spray has no chance of receiving the other contract awards at issue, Aero Spray lacks a "direct economic interest" necessary for "interested party" standing. *See, e.g.*, *United States v. Int'l Bus. Machs. Corp.*, 892 F.2d 1006, 1010–11 (Fed. Cir. 1989) (concluding that bid protestor had "at best, a trivial interest in the award" and therefore no economic interest where, if the protest were successful, the award would go to another party); *Statistica, Inc. v. Christopher,* 102 F.3d 1577, 1582 (Fed. Cir. 1996) (providing that the "substantial chance" standard requires the protesting party to "establish not only some significant error in the procurement process, but also that there was a substantial chance it would have received *the* contract award but for that error" (emphasis added)); *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1308 (Fed. Cir. 2006) ("To prove a direct economic interest ..., [the plaintiff] is required to establish that it had a 'substantial chance' of receiving *the* contract." (emphasis added)); *Orion Tech.*, 704 F.3d at 1348 ("Generally, to prove the existence of a direct economic interest, a party must show that it had a 'substantial chance' of winning *the* contract." (emphasis added)); *HVF W., LLC v. United States*, 846 F. App'x 896, 898 (Fed. Cir. 2021) ("To succeed in showing that it had a direct economic interest, [the plaintiff] had to make a sufficient showing that it had a 'substantial chance' of

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winning *the* contract." (emphasis added) (citing *Eskridge & Assocs. v. United States*, 955 F.3d 1339, 1345 (Fed. Cir. 2020))); *Geiler/Schrudde & Zimmerman v. United States*, 743 F. App'x 974, 977–78 (Fed. Cir. 2018) (holding that "Section 1491(b)'s other jurisdictional requirement confirms the view that alleged legal violations do not occur 'in connection with a procurement or a proposed procurement' whenever they might affect unidentified pending and future procurements" and that "interested party" status requires a plaintiff to "show that it is qualified to receive the contract award"); *Preferred Sys. Sols., Inc. v. United States*, 110 Fed. Cl. 48, 57 (2013) (citing Federal Circuit decisions for the proposition that "[t]o have a 'direct economic interest' means that the plaintiff must show that it had a substantial chance of receiving the contract").

***17** Even the *Weeks Marine* test does not obviate the need for an "interested party" to have a stake in the precise contract to be awarded. For instance, in a hypothetical multi-region, multiple award IDIQ procurement permitting prospective offerors to submit proposals for only a single region, such a prospective offeror could not challenge some aspect of a solicitation's specifications governing only a region for which it has no intention of submitting a proposal. That is not because the would-be plaintiff fails the "actual" offeror test; of course, at that pre-award, pre-proposal submission stage, there are no actual offerors. Rather, in such a case, the would-be plaintiff *is* a *prospective* offeror — but one who nevertheless fails the "direct economic interest" test because that offeror cannot demonstrate a non-trivial competitive injury *in the procurement itself*.

In other words, the Federal Circuit's *Weeks Marine* decision was concerned not with just any "competitive injury" *resulting* from the procurement, but rather only to the extent the plaintiff would be harmed *within the competition* for the contract it sought. That conclusion may be seen from *Weeks Marine* itself, in which the Federal Circuit adopted the "non-trivial competitive injury" test from *WinStar Communications, Inc. v. United States*, 41 Fed. Cl. 748 (1998), an earlier decision of this Court. *See Weeks Marine*, 575 F.3d at 1361–62 (noting that the trial court "chose to use the *WinStar* standard, where standing is established by alleging 'a non-trivial competitive injury which can be redressed by judicial relief' " and "conclud[ing] that the standard applied by the Court of Federal Claims in this case strikes the appropriate balance" (quoting *WinStar*, 41 Fed. Cl. at 763)).

In *WinStar*, the plaintiff was a prospective offeror when it filed its protest. 41 Fed. Cl. at 751. Its protest challenged the government's "decision to award only one ID/IQ contract" in violation of "the agency's legal duty to give preference to awarding multiple indefinite delivery/indefinite quantity contracts under a single solicitation to the maximum extent practicable." *Id.* at 750, 754. WinStar also asserted "that the geographic scope of the proposed ... contract gives the incumbent ... an unfair competitive advantage" and thus violated the agency's "legal obligation to obtain full and open competition." *Id.* at 750. This Court held that WinStar satisfied applicable standing requirements: "WinStar's direct economic interests would be affected by GSA's failure to award multiple contracts since WinStar, as an offeror, stands a better chance of receiving a contract if multiple awards are made" and because its "economic interests would also be affected by a failure to award contracts for less than the entire proposed ... area." *Id.* at 756–57 (explaining that "WinStar is more competitive in some areas, such as New York City, and therefore stands a better chance of receiving a contract if the proposed contract area is divided"). In short, because its "competitive position may improve if the challenged solicitation provisions are set aside, WinStar is an interested party with standing to bring this protest." *Id.* at 757.

Clearly, the rationale in *WinStar* was that the plaintiff had "interested party" standing to improve its "competitive position" *within the procurement for the contemplated contract or contracts*. The Court of Federal Claims held precisely that. While the government argued that the agency's decision to award a single contract under the RFP, even if improper, did not entitle WinStar to relief "because it has not been prejudiced[,]" this Court held that "as a result of the single award decision, WinStar has *lost the opportunity to compete* for multiple contracts and its chances of receiving a contract *under the ... RFP* have been reduced." *Id.* at 762 (emphasis added). Here, Aero Spray's allegations, even if true, do not demonstrate a "reduced" chance of winning a contract under the Solicitation. To the contrary, Aero Spray won the very contract award it sought. Nor, for that matter, did the government impact Aero Spray's *opportunity* to compete — either within the procurement at issue or with respect to future task order competitions under the issued contracts. [32]

32 *Weeks Marine* also favorably cited this Court's decision in *Allied Materials & Equipment Co. v. United States*, 81 Fed. Cl. 448 (2008). *Weeks Marine*, 575 F.3d at 1361-62 (noting that *Allied Materials* "advocat[ed] the *WinStar* standard").

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> *Allied Materials* may make our point here even more clearly. There, the Court held that it "will find prejudice if plaintiff demonstrates that, absent the error, it would have had a chance of receiving the contract award that is more than merely speculative." *Allied Materials*, 81 Fed. Cl. at 457. The Court explained that such a standard "takes into account the factual development of the case afforded by the completion (albeit flawed) of the offering process and the actual evaluation of completed proposals." *Id.*

***18** **[23]** **[24]** **[25]** Given the Court's textual analysis of the statutory language at issue, as well as the case law analyzed above, the Court agrees with GAO precedent, holding that "an awardee, by definition, is not an actual or prospective offeror" and that "the statutory definition of an interested party expressly bars protests where the protester is the awardee of the challenged contract." *Aegis Def. Servs., LLC*, B-412755, 2016 CPD ¶ 98, 2016 WL 1237962, at *2 & n.5 (Comp. Gen. Mar. 25, 2016) (distinguishing an awardee's challenge to corrective action "because the challenged corrective action essentially returns the procurement to a pre-award status, *i.e.*, the awardee is now akin to a prospective offeror competing for the contract"). The Court further agrees with the GAO that a contract awardee in a multiple award IDIQ procurement cannot demonstrate the requisite "direct economic interest." *See id.* at *3. As the GAO explained, "[d]ue to the nature of IDIQ contracts, ... an awardee has no legally cognizable expectation of receiving future task orders" but only a "guaranteed a minimum quantity of orders ... and a fair opportunity to compete for future task orders." *Id.* (discussing FAR 16.505(b)). Thus, while "such economic interest in the issuance of future task orders" may be sufficient under the more lenient APA standing test, such an interest "is too speculative" to constitute a "direct economic interest." *Id.* [33]

33 This GAO precedent stretches back decades. *See, e.g.*, *Aegis Def. Servs., LLC*, B-412755, 2016 CPD ¶ 98, 2016 WL 1237962, at *3 (Comp. Gen. Mar. 25, 2016) ("Indeed, [even] if Aegis's protest were found to be meritorious ... and if CPG's award were terminated ..., Aegis would be unable to obtain an additional stake in the procurement. Rather, it would remain an awardee with the same guaranteed minimum of $10,000 in task orders and a fair opportunity to compete for future task orders. For this reason, Aegis is not an interested party."); *Recon Optical, Inc.*, B-272239, 96-2 CPD ¶ 21, 1996 WL 399187, at *2 (Comp. Gen. July 17, 1996) ("Since each protester here is a fully successful offeror under the RFP each would be unable to obtain any additional stake in this procurement even if its protest of the other award were sustained. We therefore see no basis to conclude that either protester possesses the requisite direct economic interest necessary to maintain its protest."). Moreover, just like Judge Meyers in *Sirius Federal*, GAO precedent similarly distinguishes between, on the one hand, an awardee seeking a preferred contract award that it was denied and, on the other, an awardee merely seeking to preclude a separate contract award to a potential competitor. *Serv. Connected, Inc.*, B-416324, 2018 CPD ¶ 208, 2018 WL 2932163, at *2 (Comp. Gen. June 11, 2018) (explaining that while GAO "generally does not consider firms that receive one of multiple awards to be interested parties to challenge awards to other firms[,]" a "protester is an interested party [where] it challenges its priority ranking among the BPA holders").

[26] In sum, this Court holds that Federal Circuit precedent requires the conclusion that Aero Spray is not an actual or prospective offeror with standing to challenge the awards to other offerors and that it also fails to allege facts to support prejudice for the purposes of standing, whether or not we apply the traditional post-award standing test. The Court thus concurs with the GAO that "[b]y definition, an IDIQ contract awardee ... cannot be an actual or prospective offeror with respect to another IDIQ contract awarded under the same solicitation" based on "the simple fact that a contractor that has already been awarded an IDIQ contract cannot be awarded additional IDIQ contracts, even if it could show flaws in the agency's award of those contracts." *AAR Airlift Grp., Inc.*, B-414690, 2017 CPD ¶ 273, 2017 WL 4004517, at *4 (Comp. Gen. Aug. 22, 2017). Even if Aero Spray "were to successfully challenge the IDIQ awards to [the intervenors,] it would not result in further IDIQ contract awards to" Aero Spray. *Id.*

A straightforward hypothetical further proves the point. The Solicitation and resulting contracts at issue clearly permit the Agency to onboard additional contractors over time. *See* AR 380 (§ C27 ("Onboarding of Contractors After Initial Award(s)"). Specifically, the "Government reserves the right to announce *a new competition* (Onboarding) for the

purpose of adding additional multiple award [IDIQ] contract holders." *Id.* (emphasis added). Should the Agency decide to engage in such a new competition, "the CO will publicize a notice by modifying the original solicitation, and complete a new source selection." *Id.* The question is whether Aero Spray would have standing to challenge any aspect of the hypothetical "new competition" (including its results). That answer, in the Court's view, is clearly in the negative; given that Aero Spray already received a contract award for all that it proposed, Aero Spray could not seek yet another award and, thus, could not be a prospective or actual offeror with respect to that new competition. The Court cannot conceive of any reason why there should be a distinction between, on the one hand, a multiple award procurement where all awards are made at the same time, and, on the other hand, a multiple award procurement where the competition takes place, and awards are made, in stages. In both cases, so long as an offeror receives the award for which it submitted a proposal, that offeror lacks standing to challenge other awards (whether made at the same time or in the future); the timing of the awards should make no difference.

***19** Moreover, the fact that the onboarding contract provision, *see* RFP § C27, contains explicit, substantive terms governing the process for additional awards demonstrates that Aero Spray's complaint likely should be in the nature of a CDA claim, similar to the cases Judge Meyers distinguished in *Sirius Federal*, discussed *supra*. *See Sirius Federal*, 153 Fed. Cl. at 420 ("a contractor may not circumvent the CDA by invoking this Court's protest jurisdiction"). In that regard, the onboarding provision is contained within the RFP's Section C ("General Contract Term and Conditions"), AR 369, and thus even if the Agency improperly onboarded additional competitors, Aero Spray's remedy arises from its status as a contractor, which is classic CDA territory. [34] *Digital Techs., Inc. v. United States*, 89 Fed. Cl. 711, 730 (2009) (holding that because the Federal Acquisition Streamlining Act ("FASA") of 1994, Pub. L. No. 103-355, § 1004, 108 Stat. 3243, 3252–53 (codified as amended at 10 U.S.C. § 2304c(e) and 41 U.S.C. § 4106(f)), "by its terms, only prohibits task order protests, this court has jurisdiction to hear" contract claims alleging "breach of the fair opportunity provisions of [the] contract"). [35]

34 FAR 2.101 (noting that a "[c]ontract clause or 'clause' means a term or condition used in contracts or in both solicitations and contracts, and applying after contract award or both before and after award" while a "[s]olicitation provision or 'provision' means a term or condition used only in solicitations and applying only before contract award"). In this case, the onboarding clause, § C27 (AR 380), applies after award.

35 *See also* Vernon J. Edwards, *Postscript: Breach of Loss of the Fair Opportunity to Compete*, 20 Nash & Cibinic Rep. ¶ 59 (Dec. 2006) ("Although contractors under multiple award IDIQ contracts cannot protest the award of a task or delivery order, it does not follow that they cannot pursue a claim under the CDA when they think that the Government has breached its promise to give them a fair opportunity to be considered for an order. Protests and claims are very different things in terms of their objectives, the remedies available, and their effect on Government operations."), *quoted in Digital Technologies*, 89 Fed. Cl. at 729; *see also Vanquish Worldwide, LLC v. United States*, 147 Fed. Cl. 390, 398 (2020) (holding that "the Court cannot discern anything in either the language, scheme, or underlying purposes of FASA which suggests that Congress intended to strip this Court of jurisdiction to hear CDA claims for damages that allege the government has violated contractual procedures governing the assignment of task orders"). The RFP in this case contained a contract clause providing for a "fair opportunity" to compete for task orders. AR 375 (§ C15.1.1).

In sum, and given *AFGE's* focus on disappointed bidders and its rejection of the broader APA *Scanwell* standing rules, the undersigned agrees with Judge Hertling that "[a]bsent some exception to the Federal Circuit's approach, the Court is bound by *AFGE's* definition of 'interested party' and subsequent cases interpreting the standing requirement under § 1491(b)." *SEKRI, Inc. v. United States*, 152 Fed. Cl. 742, 751 (2021). This Court will not craft an exception or a new test on its own.

E. *National Air Cargo*

As noted above, Aero Spray, in an attempt to establish standing here, urges this Court to follow *National Air Cargo Group, Inc. v. United States*, 126 Fed. Cl. 281 (2016). Pl. MJAR at 7–8; Pl. Resp. at 1–7. In that case, after receiving one of the initial five awards under an IDIQ solicitation, the plaintiff-awardee challenged a sixth award on the basis that the agency "violated terms of the solicitation limiting awardees," violated applicable statutes and regulations, and

acted irrationally given the sixth awardee's past performance record. *National Air Cargo*, 126 Fed. Cl. at 284. The government moved to dismiss for lack of jurisdiction, challenging the plaintiff's standing pursuant to RCFC 12(b)(1). *Id.* at 284–85. Denying the motion to dismiss, Judge Lettow concluded that the plaintiff's allegation that it suffered a non-trivial competitive injury as a result of increased competition due to the sixth award was sufficient to show prejudice and thus qualified plaintiff as an "interested party" with standing. *Id.* at 295. In so holding, Judge Lettow applied the pre-award standing test from *Weeks Marine* because the plaintiff "does not seek a contractual award but instead seeks to remedy an alleged violation of procurement law that has affected the task order pool." *Id.* at 295 (applying "non-trivial competitive injury" test).

***20** This Court is not persuaded to follow *National Air Cargo* for several reasons. [36]

36 As an initial matter, Aero Spray is flat wrong that a rejection of its position means that "this Court would in fact be overturning *National Air Cargo*." Pl. Supp. Br. at 10. That is because no judge on this court is "bound by other decisions in the Court of Federal Claims[.]" *Buser v. United States*, 85 Fed. Cl. 248, 259 n.12 (2009); *see also Octo Consulting Grp., Inc. v. United States*, 117 Fed. Cl. 334, 361 (2014).

In adopting the relaxed, pre-award *Weeks Marine* standing test for prejudice, the Court in *National Air Cargo* relied primarily upon the Federal Circuit's decision in *Systems Application & Technologies, Inc. v. United States*, in which our appellate court noted that "[a] protest will, by its nature, dictate the necessary factors for a 'direct economic interest.' " 691 F.3d 1374, 1382 (Fed. Cir. 2012). Out of context, this statement suggests a case-by-case assessment regarding the proper prejudice standard for standing purposes. In context, however, this statement is merely a truism; the procedural posture of a bid protest impacts the nature of the requisite prejudice a plaintiff must demonstrate in terms of its "direct economic interest." In that regard, a pre-award solicitation protest is different than a post-award protest:

> A protest will, by its nature, dictate the necessary factors for a "direct economic interest." In pre-award protests, for instance, the plaintiff must show "a non-trivial competitive injury which can be addressed by judicial relief." In postaward protests, the plaintiff must show it had a "substantial chance" of receiving the contract.

Id. at 1382 (citations omitted). Indeed, the Federal Circuit in *Systems Application*, while specifically citing *Weeks Marine Inc.*, 575 F.3d at 1361–62, as having "reject[ed] the proposition that the 'substantial chance' requirement applies outside of the postaward context," 691 F.3d at 1382, nowhere intimated the possibility of the converse: that the more relaxed pre-award standard might apply in a post-award protest where an offeror is an awardee with respect to the only contract it sought. In other words, the Federal Circuit has established only a single standing test applicable in a post-award protest, with the cognizable "direct economic interest" depending on whether the plaintiff will have a "substantial chance" at receiving *the contract sought*.

Aero Spray, in contrast, already has won the only contract award to which it could possibly be entitled. Moreover, nothing in *Weeks Marine* or *Systems Application* demonstrates that the relevant "direct economic interest" may include future competitions for task orders, as opposed to the contract award sought. Again, as demonstrated above, the "non-trivial competitive injury" is an injury suffered *in the competition for the contract(s)*, not something arising from the award(s).

National Air Cargo acknowledged that, in *Systems Application*, the Federal Circuit "found that the case was *factually akin to a pre-award protest* and consequently applied the 'non-trivial competitive injury' test, finding plaintiff would suffer such an injury if it was forced to recompete for a contract it had already won." 126 Fed. Cl. at 293 (emphasis added). But that reasoning, too, supports the Court's decision *not* to apply the more lenient standard here for the simple reason that we fail to understand how or why Aero Spray's alleged facts and standing theory make its case "akin to a pre-award protest." [37] Crafting or adopting a different standard to apply in this post-award protest case cuts sharply against the grain of binding precedent. *Orion Tech., Inc. v. United States*, 704 F.3d 1344, 1348 (Fed. Cir. 2013) (rejecting plaintiff's argument "that the 'non-trivial competitive injury' standard should apply to this post-proposal, preevaluation protest" because that standard is simply "an exception to the general standing test in the case of pre-bid, pre-award protests"). In *COMINT Systems Corp. v. United States*, the Federal Circuit similarly rejected the plaintiff's argument that "it need only show a 'non-trivial competitive injury' to establish standing" on the basis that "in *Weeks Marine* this court specifically held that the 'non-trivial competitive injury' standard was applicable to 'a *pre-*

award protest.' " 700 F.3d 1377, 1383 n.7 (Fed. Cir. 2012) (emphasis in original) (quoting *Weeks Marine,* 575 F.3d at 1363). Accordingly, the Federal Circuit in *COMINT* held that the relaxed "standard does not apply here *because* Comint's bid protest is a post-award protest." 700 F.3d at 1383 n.7 (emphasis added).

37 In *Systems Application*, the Federal Circuit noted that although the "Army had not yet implemented the corrective action" at issue and that the plaintiff "was the contract awardee," "[n]either of these facts are material to the question of jurisdiction." 691 F.3d at 1381. Again, as explained *supra*, we do not hold that merely labeling a plaintiff an "awardee" provides a *per se*, definitive answer to the "interested party" question. On the other hand, *Systems Application's holding* does not support Aero Spray's interpretation of "interested party." It stands, instead, for the proposition that an awardee has standing to challenge an agency's "decision to engage in corrective action [that] will arbitrarily require [the awardee] to win the same award twice." *Id.* at 1382 ("Obtaining a contract award ... is often a painstaking (and expensive) process. An arbitrary decision to take corrective action without adequate justification forces a winning contractor to participate in the process a second time and constitutes a competitive injury to that contractor."). Moreover, in *Systems Application*, "the Army's decision to engage in corrective action [would have] require[d] [the awardee] to re-compete for a contract after its price had been made public." *Id.* at 1383. The interest SA-Tech sought to protect in its protest was thus in the very award it had sought and had already won but that was threatened by the corrective action. Aero Spray's interest here in the other contract awards is not comparable.

21** **[27]** *National Air Cargo*'s approach to the prejudice test for standing is based on the further premise that "not all protestors seek the award of a contract." 126 Fed. Cl. at 292. In particular, according to *National Air Cargo*, "[m]any protestors do not ultimately seek the award of a contract, but they wish instead to vindicate *some other economic interest* within this court's jurisdiction. That is true especially for protests that are pre-award or 'in connection with a procurement.' " *Id.* at 293 (emphasis added) (discussing *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1288–89 (Fed. Cir. 1999)). But the applicable definition of "interested party" does *not* include merely a plaintiff with "some other economic interest" in the procurement, 126 Fed. Cl. at 293, but rather includes only an actual or prospective offeror "whose direct economic interest would be affected by the award of the contract" at issue, 31 U.S.C. § 3551(2)(A). This Court concurs with *National Air Cargo* that a necessary implication of *RAMCOR* is that a plaintiff may have standing to pursue a § 1491(b) action even if that particular action does not itself seek the contract award.[38] But it does not follow that a plaintiff may qualify as an "interested party" where it is *not* seeking the contract award at all — *i.e.*, either in the procurement generally or in a GAO protest. In other words, *RAMCOR* addresses ***what a § 1491(b) action may include but does not define ***who*** qualifies as "an actual or prospective bidder or offeror" or otherwise meets the remaining elements of an "interested party."

38 Although "the fourth prong of 28 U.S.C. § 1491(b)(1) constitutes an independent cause of action that is best understood as 'cover[ing] even non-traditional disputes arising from the procurement process as long as the violation is in connection with a procurement or proposed procurement[,]' " that does not necessitate this Court's carving out a new "interested party" test absent Federal Circuit direction to do so. *Tolliver Grp., Inc. v. United States*, 151 Fed. Cl. 70, 99 (2020) (internal quotation marks omitted) (discussing *RAMCOR* and quoting *Validata*, 169 F. Supp. 3d at 78).

In *RAMCOR*, the plaintiff challenged an agency's override of an automatic stay of the procurement triggered by the timely filing of a GAO protest. 185 F.3d at 1288–89. At the risk of being repetitive, the question of *who* may file a § 1491(b) action must be distinguished from what type of action an "interested party" may maintain in this Court pursuant to § 1491(b). In noting that the plaintiff in *RAMCOR* "would not [have] be[en] in line for contract award as a result of its suit," 126 Fed. Cl. at 294, *National Air Cargo* appears to conflate the *who* and *what* questions. Keeping in mind that the definition of "interested party" was not addressed in *RAMCOR*, this Court infers from that case that only an "actual or prospective" offeror *with respect to the contract at issue* may maintain an action under the last prong of § 1491(b). In *RAMCOR*, the plaintiff was an *actual* offeror — indeed, it was a disappointed bidder in the parlance of *AFGE*, with a protest pending at GAO — "whose direct economic interest would be affected by the award of the contract" at issue. Because that condition — regarding *who* may file an action

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— was met, the *RAMCOR* plaintiff had standing to object to an "alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1).

In contrast, Aero Spray here — as demonstrated above — is not an "actual or prospective" offeror with respect to the contract awards at issue. This Court thus rejects the contention that a plaintiff "is an 'actual' bidder [just] because, as a matter of fact, it bid on this IDIQ solicitation." *National Air Cargo*, 126 Fed. Cl. at 295. *National Air Cargo's* semantic move is to focus on whether a plaintiff "bid on this IDIQ solicitation." *Id.* But CICA's definition of "interested party" requires more; it necessitates that the plaintiff be an actual or prospective offeror "with respect to a contract ... described in paragraph (1)," which, in turn, refers to the contract award that is the subject of the GAO protest or § 1491(b) action. 31 U.S.C. § 3551(1)(C), (2)(A). [39]

39 Another thought experiment is warranted here. Imagine several disappointed offerors — including an incumbent contractor performing a predecessor contract — file timely GAO protests, challenging an award to a competitor, thereby triggering the automatic CICA stay. If the government overrides the stay, may the incumbent contractor maintain a *RAMCOR*-type action here at the Court of Federal Claims, even if the GAO dismisses the incumbent contractor's protest because its allegations "fail[ ] to establish that it had a substantial chance of receiving the award, and, therefore, it is not an interested party"? *Gulf Civilization Gen. Trading & Contracting Co.*, B-419754, 2021 CPD ¶ 208, 2021 WL 2394669, at *6 (Comp. Gen. June 10, 2021). This Court would definitively answer that hypothetical in the negative because even if the incumbent is harmed by an unlawful override — *i.e.*, the government will start transitioning the incumbent's work to the competitor awardee — the incumbent is no longer an interested party to the underlying contract award at issue and, thus, is not an "interested party" within the meaning of CICA's definition and cannot challenge the override. According to *National Air Cargo*, however, the incumbent would appear to be an actual offeror merely because it submitted a proposal for the procurement generally and because it "has an economic interest in stopping the government" from proceeding with the transition. 126 Fed. Cl. at 294. In the undersigned's view, such an outcome is a necessary implication of *National Air Cargo* but cannot be squared with Federal Circuit precedent. For that reason, the Court agrees with the government that if Aero Spray were correct "that a plaintiff could protest a contract award to another company because the resulting potential increase in competition for follow-on contracts" in the form of task orders "gives the plaintiff a 'direct economic interest' in the competitor's contract award, there is no reason why the Federal Circuit should have prohibited plaintiffs who are 'rated below second' in a procurement from bringing suit." Def. Resp. at 6–7. Were such protests allowed, "[a] plaintiff company might easily allege that a contract award will confer some significant competitive advantage on a competitor company so that even if the plaintiff were ineligible for award, it should have standing to challenge an award to its direct competitors" as unlawful. *Id.* at 7. Of course, "the Federal Circuit has repeatedly held that such a protest is impermissible," *id.*, foreclosing Aero Spray's argument.

***22** Returning to the "direct economic interest" prong of CICA's "interested party" definition, *National Air Cargo* concluded — contrary to the GAO's position — that an IDIQ contract awardee has a cognizable interest in more than just (a) the minimum award amount necessary to supply consideration in order to form a binding contract, and (b) the opportunity to compete for task orders. 126 Fed. Cl. at 295-96 (holding that "[t]he minimum satisfies the law of consideration, but it does not mean that the IDIQ contractors lack a 'direct economic interest' in the competition for task orders"). Again, this Court concurs with the GAO's approach to this issue. The likelihood of increased competition may constitute an injury in fact for Article III purposes, but it does not follow that Aero Spray's "*direct* economic interest" is impacted by the other awards, particularly in light of the fact that: (1) the government's assessed need was to have "approximately 20–24" aircraft available, AR 10, whereas Aero Spray only offered 15 aircraft, AR 1365; and (2) Aero Spray, as an awardee, is not guaranteed anything more than the mandatory minimum contract amount and the opportunity to compete. *See Interest*, Black's Law Dictionary (11th ed. 2019) (defining "direct interest" as "[a] certain, absolute interest"). The Court concludes that Aero Spray's "certain, absolute interest" is only in its own contract award, which does not include a guaranteed level of competition. *See* Pl. MJAR at 26 (Aero Spray's concession that it "will not

directly be deprived of the opportunity to compete for task orders" (emphasis added)).

Finally, Aero Spray relies on two subsequent decisions from this Court, *PAE-Parsons Global Logistics Services., LLC v. United States*, 145 Fed. Cl. 194 (2019), and *Sirius Federal, LLC v. United States*, 153 Fed. Cl. 410 (2021), for the proposition that an awardee of a multiple IDIQ contract has standing to challenge other contract awards. Pl. Resp. at 6–7. Aero Spray's reliance on these case misses the mark. As explained above, this type of case involves a post-award challenge in which a contract awardee was found to have standing to protest that it had a "substantial chance" of being awarded a more valuable contract; those cases did *not* involve a challenge based merely on increased competition in future task order competitions. *See, e.g., PAE-Parsons*, 145 Fed. Cl. at 199–200 (where government concurrently awarded four "very different" IDIQ contracts, the court concluded that because the protestor was awarded a lower priority IDIQ contract, the plaintiff "clearly has standing as a disappointed bidder with regard to the IDIQ contract award at issue in this case"). [40] These decisions certainly do not demonstrate that this Court routinely has applied anything other than the "substantial chance" standard in the post-award context or exempted the plaintiff from being an actual offeror for the contract award being challenged. To the extent *National Air Cargo* has crafted such an exemption, it effectively applied APA standing rules, something this Court will not do.

40 Similarly, *Glenn Defense Marine (Asia) PTE, Ltd. v. United States,* 97 Fed. Cl. 311 (2011), *appeal on other grounds dismissed as moot after government settled with plaintiff*, 469 F. App'x. 865 (Fed. Cir. 2012) — another case upon which *National Air Cargo* relies at some length — involved a challenge to the government's award of multiple contracts where the plaintiff alleged that "the solicitation required one IDIQ contract award." *National Air Cargo*, 126 Fed. Cl. at 296 (citing *Glenn Def.*, 97 Fed. Cl. at 317 n.3). *Glenn Defense* is distinguishable, however, because the plaintiff, there, clearly sought a greater scope of work than it was awarded (services supporting two ports in the Philippines for the Navy, rather than four such ports for which the plaintiff submitted a proposal). 97 Fed. Cl. at 318–23. Here, in contrast, Aero Spray does not dispute it received all that it was entitled to receive per its proposal. More significantly, in *Glenn Defense*, Judge Allegra not only noted that "[t]o demonstrate prejudice, the protestor must show that there was a substantial chance it would have received the contract award but for that error[,]" but also specifically held that the plaintiff satisfied a version of the Federal Circuit's "but for" post-award standing test: "Cases construing this second variation on the prejudice inquiry [for standing] have held that it requires merely a 'viable allegation of agency wrong doing,' with 'viability turning on the reasonableness of the *likelihood of prevailing on the prospective bid* taking the protestor's allegations as true.' " *Glenn Def.*, 97 Fed. Cl. at 317 & n.3 (first quoting *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999) (internal quotation marks omitted), and then quoting *McKing Consulting Corp. v. United States*, 78 Fed. Cl. 715, 721 (2007) (emphasis added)).

***23**

* * * *

For the reasons explained above, this Court holds Aero Spray lacks standing and that its pending complaint thus should be dismissed pursuant to RCFC 12(b)(1).

III. AERO SPRAY'S PROTEST IS UNTIMELY PURSUANT TO THE FEDERAL CIRCUIT'S *BLUE & GOLD* DECISION

[28] The government argues, and the Court agrees, that "[g]iven the confluence of ambiguous language and provisions, the question of whether an actual weighing of each aircraft proposed, in contract configuration, was required *at the time of proposal submission* was patently ambiguous" such that if Aero Spray "was concerned that a competitor would be able to submit a proposal without including such a weight and balance report, it was required to raise this issue prior to submitting its bid, and cannot do so now." Def. MJAR at 36 (emphasis added) (citing *Blue & Gold*, 492 F.3d at 1313); *see also* Def. Resp. at 13–14. Accordingly, even if Aero Spray has standing, its protest is untimely.

[29] Practitioners before this Court (and government contractors of any experience) are, at this point, very familiar with the requirement that a prospective offeror must challenge patent solicitation ambiguities in a timely manner or be barred from relying upon a preferred solicitation interpretation in a later, post-award bid protest. *See, e.g.*, *VS2, LLC v. United States*, —— Fed. Cl. ——, 2021 WL 4167380, at *8–*13

(Sept. 1, 2021). As discussed at length in *VS2*, the Federal Circuit held in *Blue & Gold* "that a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action" in this Court." 492 F.3d at 1313; *see also VS2*, —— Fed. Cl. at ——, 2021 WL 4167380, at *8. This "waiver rule" is "rooted (albeit somewhat loosely) in the statutory text providing this Court with jurisdiction to decide procurement-related actions[.]" *VS2*, —— Fed. Cl. at ——, 2021 WL 4167380, at *8 (discussing 28 U.S.C. § 1491(b)(3)'s "mandate[ ] that 'the courts shall give due regard to the interests of national defense and national security and *the need for expeditious resolution of the action*' " and explaining that "[r]ecognition of a waiver rule, which requires that a party object to solicitation terms during the bidding process, furthers this statutory mandate" (quoting § 1491(b)(3))); *see also Inserso Corp. v. United States*, 961 F.3d 1343, 1352 (Fed. Cir. 2020) (holding that because plaintiff waited until after the award to challenge it, plaintiff "forfeited its right" to do so, and that bidders "exercising reasonable and customary care" were on notice of the alleged defect "long before" award). "A waiver rule thus prevents contractors from taking advantage of the government and other bidders, and avoids costly after-the-fact litigation." *Blue & Gold*, 492 F.3d at 1314. The Federal Circuit went on to conclude that "the same reasons underlying application of the patent ambiguity doctrine against parties to a government contract speak to recognizing a waiver rule against parties challenging the terms of a government solicitation." *Id.*

***24** The central thrust of Aero Spray's amended complaint is that "[t]he Agency's decision to award IDIQ contracts to Fletcher Flying and Henry's Aerial despite neither company having an aircraft ready to perform on the contract as required by the Solicitation is arbitrary, capricious, and an abuse of discretion." Am. Compl. ¶ 36; *see also* Am. Compl. ¶ 42 ("Nowhere in the Solicitation does the Solicitation allow aircraft to be proposed ... that could potentially be prepared to perform on contract ...."). According to Aero Spray's reading of the Solicitation, it "clearly ... does not imagine the acceptance of aircraft 'anticipated' to be complete at some arbitrary date after award" and, thus, "[t]he only reasonable interpretation of the Solicitation is one that required aircraft to be configured, weighed, certified, and able to perform on the contract by the submission of the proposals, *not* May 2021." *Id.* ¶¶ 45-46.

The Court disagrees.

At least one offeror during the procurement process clearly identified an ambiguity in the Solicitation because a question was asked regarding precisely *what* information had to be included in the proposal and *by when* the proposed aircraft had to be ready. In particular, Question 26 asked whether "a vendor [may] include an aircraft in its offer that will not be delivered to that vendor in Fire Boss configuration until after the solicitation closes?" AR 127. That same question further inquired whether "it [would] be acceptable for the vendor to base its empty weight and payload calculations on an aircraft in wheel configuration with estimates on what the Fire Boss will weigh" after it is fully configured. *Id.* The Agency's terse response did not answer the question; it indicated only "See Questions 2 & 3." *Id.*

Unfortunately, the Agency's answers to Question 2 and Question 3 shed little to no light on the ambiguity that Question 26 sought to clarify. The very premise of Question 2 was that the offeror would not have two Fire Boss aircraft complete "by the submission date for the Solicitation." AR 122. The Offeror wanted to know *how* it "should ... handle listing the aircraft[.]" *Id.* The Agency's answer did not say that such aircraft could not be proposed. Rather, the Agency's answer refers simply to "*proposed* aircraft." *Id.* (emphasis added). Further, the Agency instructed that "[t]he proposal must include at least one aircraft that meets the minimum requirements of the solicitation." *Id.* This bare-bones instruction provides neither temporal parameters nor direction about "listing the aircraft"; nothing in it, therefore, is inconsistent with the government's view that the aircraft need not be ready by the time of proposal submission. In other words, the answer to Question 2 does not clearly address either of the inquires posed in Question 26.

Question 3 similarly appears designed to get at the same or similar ambiguity as Question 26. In that regard, Question 3 asked the Agency to clarify whether "[f]or a Contractor to offer an aircraft in response to this solicitation, does the aircraft need to be in operational Fire Boss contract configuration, including an acceptable Weight & Balance (in accordance with Section B32) and Equipment List that would allow the Aircraft Questionnaire to be filled out?" AR 122–23. The Agency's answer to that question all but restates the response to Question 2: "A proposal must include at least one aircraft that meets the minimum requirements of Section A1, and all related requirements and documentation as stated in the solicitation ...." AR 123. Once again, in response

to Question 3, the government neither provided guidance on whether *any* proposed aircraft had to be in operational configuration *at the time of proposal submission*, nor clarified whether providing estimated data would be acceptable.

[30] In short, Question 26 was never answere, clearly or otherwise. The result is that the Solicitation was patently ambiguous. *See Quanterion Sols., Inc. v. United States*, 152 Fed. Cl. 434, 445 (2021) ("An ambiguity in an RFP is generally patent if offerors seek clarification of the ambiguous provision prior to submitting their proposals." (citing *Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1312–13 (Fed. Cir. 2016))). [41] When a Solicitation is patently ambiguous, the government remains free to select a reasonable interpretation, as it sees fit, during the evaluation and award segments of the procurement process. *See Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 998 (Fed. Cir. 1996) ("If a solicitation contains contract language that is patently ambiguous, a protestor cannot argue ... that its interpretation is proper unless the protestor sought clarification of the language from the agency before the end of the procurement process."); *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1162 (Fed. Cir. 2004) ("If an ambiguity is obvious and a bidder fails to inquire with regard to the provision, his interpretation will fail."); *Wackenhut Servs., Inc.*, B-276012, 98-2 CPD ¶ 75, 1998 WL 650258, at *3 (Comp. Gen. Sept. 1, 1998) ("[A]n offeror who chooses to compete under a patently ambiguous solicitation does so at its own peril, and cannot later complain when the agency proceeds in a way inconsistent with one of the possible interpretations."). Here, the Agency effectively adopted an interpretation that Aero Spray does not prefer, but it is too late to complain about that now. *Blue & Gold*, 492 F.3d at 1315 (holding that "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so *prior to the close of the bidding process* waives its ability to raise the same objection afterwards in a § 1491(b) action in the Court of Federal Claims" (emphasis added)).

41 *Per Aarsleff*, in turn, held that an "ambiguity in the solicitation was patent, as reflected in the questions received by the Air Force and the two plausible interpretations" the court summarized. 829 F.3d at 1312–13. In that case, "[f]ollowing clarification during the question-and-answer period, the ambiguity was removed, and so there was at that time neither a patent nor a latent ambiguity." *Id.* In this case, in contrast, the Solicitation's ambiguity was never removed.

***25** In any event, as Henry's Aerial points out, offerors were required to submit with their respective proposals an "Aircraft Information Form." AR 429 (RFP Exhibit E-3) (instructing offerors to "reproduce and submit [a copy] for each aircraft offered"). That form, in turn, required offerors to calculate a "*proposed* aircraft payload" to include the "[w]eight of Equipment *to be added*" to the proposed aircraft, defined as the "[e]quipment *to be added* to meet the requirements of this contract." *Id.* (emphasis added). Relatedly, the form permits offerors to note "Empty Weight in current configuration plus and/or minus equipment *to be added or removed* for contract compliance." *Id.* (emphasis added). Based upon that form's language, Henry's Aerial persuasively argues that the Agency clearly intended to permit merely "a projection of what you're going to add." Tr. 67:20-22. [42] There is little or no textual indication in the RFP, even as supplemented with the Q&As, that offerors were required to use actual values — as opposed to proposed or projected equipment "to be added or removed" in the future — for any proposed airplanes or, as Aero Spray contends, for at least one such airplane. To the extent there is any such indication, the Court cannot reconcile all of the various textual references to extract a clear meaning in the manner Aero Spay advocates. The Solicitation is patently ambiguous even following the Q&As, if not because of them.

42 Tr. 67:20 — 68:5. (THE COURT: Oh, so you're saying this [form] shows that it's a projection of what you're going to add. MR. SMITH: Correct. THE COURT: That's a good point. MR. SMITH: And it goes on to say, ... ['']Computed Empty Weight in Contract Configuration. Empty weight in current configuration plus and/or minus equipment to be added or removed for contract compliance. ['] This information is useless if every aircraft — if you have to propose an aircraft that is already in contract configuration.").

Accordingly, in the alternative, the Court holds that Aero Spray's pending complaint should be dismissed as untimely pursuant to RCFC 12(b)(6). [43]

43 This Court considers a failure to meet the *Blue & Gold* waiver rule under RCFC 12(b)(6), rather than under RCFC 12(b)(1). *SEKRI*, 152 Fed. Cl. at 752 (holding that "the *Blue & Gold Fleet* waiver rule is not jurisdictional and thereby more appropriately

addressed under RCFC 12(b)(6)" because the Federal Circuit, in *Blue & Gold*, "did not establish the waiver rule as a limit on jurisdiction"); *VS2, LLC v. United States*, —— Fed. Cl. ——, ——, 2021 WL 4167380, at *11 (Sept. 1, 2021).

IV. EVEN IF AERO SPRAY'S CLAIMS HAD MERIT, THIS COURT WOULD REJECT ITS REQUEST FOR INJUNCTIVE RELIEF

[31] Even if Aero Spray had standing and its claims were timely pursuant to *Blue & Gold* — and even if this Court reached the merits and decided the case in favor of Aero Spray — this Court nevertheless would reject Aero Spray's request for permanent injunctive relief.

[32] The Tucker Act vests this Court to award "any relief that the court considers proper, including ... injunctive relief ...." 28 U.S.C. § 1491(b)(2); *see* RCFC 65. In evaluating whether permanent injunctive relief is warranted in a particular case, a court must consider: (1) whether the plaintiff has succeeded on the merits; (2) whether the plaintiff has shown irreparable harm without the issuance of the injunction; (3) whether the balance of the harms favors the award of injunctive relief; and (4) whether the injunction serves the public interest. *PGBA v. United States*, 389 F.3d 1219, 1228–29 (Fed. Cir. 2004).

Assuming for the sake of argument that Aero Spray could meet the threshold requirement for permanent injunctive relief — *i.e.*, succeeding on the merits of its claims — the Court finds that: (1) Aero Spray will not suffer irreparable harm in the absence of an injunction; and (2) the balance of harms easily tips in favor of the government.

First, the Court notes that Aero Spray did not seek a preliminary injunction or secure an agreed-upon stay of the challenged contract awards, suggesting a lack of irreparable harm. *PGBA*, 389 F.3d at 1229, 1232 (affirming the denial of injunctive relief where the trial court "considered PGBA's failure to seek a preliminary injunction as a factor weighing against a grant of injunctive relief").

[33] Second, although a plaintiff offeror may demonstrate irreparable harm where a solicitation improperly impairs the offeror's ability to compete for the contract at issue or where an agency's decision improperly costs a disappointed offeror the contract it sought, the only putative injury here is that arising from the possibility of future increased competition for task orders.[44] Accordingly, the Court agrees with the government that "even assuming that [such] economic harm can be considered irreparable harm ..., such harm pales in comparison to the risk to DOI's firefighting capabilities and the nation's woodlands that the United States would suffer in the event of a permanent injunction." Def. Resp. at 16. In that regard, the government, via a declaration of the cognizant contracting officer, provides support for this Court's finding that the government has a present need for all of the aircraft services for which the Agency already has contracted — that is, including those the Defendant-Intervenors offered. *Id.* at 16–18 (discussing Def. Resp. Ex. A ¶¶ 5–7). The Court finds the contracting officer's explanation persuasive and agrees that enjoining the awards to Henry's Aerial and Fletcher Flying would reduce the Agency's retained fleet and "increase[ ] the danger not only to the national woodlands" but also to "firefighting personnel on the ground who would be aided by these additional airborne firefighting assets." Def. Resp. at 17 (citing Def. Resp. Ex. A ¶ 6).[45]

44 Aero Spray's briefs and oral argument were sprinkled with the assertion of an additional harm: "In order to actually comply with the solicitation, [Aero Spray] was required to expend funds that the awardees did not. They were able to push off to some nebulous date in the future the cost of converting their aircraft into Fire Boss aircraft. As a result, they gained a competitive advantage over [Aero Spray]." Pl. MJAR at 26; *see also* Tr. 15:2–16:20 (Aero Spray arguing injury in the form of "impact on cost" and "competing against other offerors ... that didn't meet the requirements of the solicitation"). The Court does not understand this argument because no party disputes that airplanes cannot be provided by any contractor unless and until they meet contract specifications and regulatory flight requirements. Aero Spray does not explain — and points to no evidence in the record demonstrating — how Defendant-Intervenors' decision to propose fewer aircraft that were not yet ready at the time of proposal submission either (1) impacted Aero Spray's decision to propose 15 aircraft that were ready for use, or (2) will impact its competitiveness for task orders. Tr. 15:2–16:16. Moreover, the RFP (and resulting contracts) provide that "Contractors' pricing for task orders shall not exceed the prices in the IDIQ price schedule" and that "[d]iscounted pricing is permitted." AR 375 (RFP § C15.1.1). Accordingly, Aero Spray is free to lower its pricing in task order competitions. Tr. 19:6–8 (Aero Spray

agreeing that proposed "prices are ceiling prices" and that contractors are "free to discount" from those ceiling prices). Again, to the extent another awardee now has an aircraft ready to compete — and presumably had to incur costs just as Aero Spray did — Aero Spray does not explain why the resulting competition is unfair just because Aero Spray had its airplanes ready earlier. *Cf. MLS-Multinational Logistic Servs., Ltd v. United States*, 143 Fed. Cl. 341, 374 (2019) (noting "that the price submitted by [the plaintiff] in response to the Solicitation when competing for a contract was a maximum, not a fixed amount, for the potential, future task orders" and "[t]herefore, even if [the plaintiff]did not submit its lowest bid to receive a contract in response to the Solicitation because of its uncertainty with the Port Tariff provisions before the proposals were due, given the clear direction from the Navy that it would not make any changes to the Port Tariff provisions at this time, [the plaintiff]could now price that certainty in its offer when submitting bids for future task orders").

45 The Court's consideration of such extra-record evidence is appropriate when evaluating prejudice or the propriety of injunctive relief. *See, e.g., State of N. Carolina Bus. Enters. Program v. United States*, 110 Fed. Cl. 354, 365 (2013) ("[I]t is proper to admit an affidavit to show prejudice — even though it is not proper to show error."); *AshBritt, Inc. v. United States*, 87 Fed. Cl. 344, 366–67 (2009) ("In general, it is appropriate to add evidence pertaining to prejudice and the factors governing injunctive relief to the record in a bid protest — not as a supplement to the AR, but as part of this Court's record."); *Pinnacle Sols., Inc. v. United States*, 137 Fed. Cl. 118, 131 (2018) ("the government need not seek to supplement the administrative record with documents that address the injunctive relief factors").

***26** Third, contrary to Aero Spray's argument, the Court agrees with the government that the contract awards to Henry's Aerial and Fletcher Flying are not "guaranteed portions of the contract[,] which harms the total value of [Aero Spray's] award." Def. Resp. at 17 (quoting Pl. MJAR at 26). The government is correct that "there is no minimum dollar value guarantee for any IDIQ awardee" in the procurement at issue, but rather "the only economic benefit guaranteed by the IDIQ award is listed at [RFP] Section A2.2." Def. Resp. at 17. That RFP section provides that the minimum guarantee to awardees would be "aircraft, equipment, and pilot inspection during the Base year." AR 339 (RFP § A2.2 ("Minimum Guarantee/Maximum Quantity")). Thus, "[t]he inclusion of additional IDIQ awardees does not reduce the 'guaranteed portions of the contract' one iota." Def. Resp. at 18.

Finally, Aero Spray's request for permanent injunctive relief is fatally undermined by the following critical admission (in its motion for judgment on the administrative record, addressing the "balance of hardships"):

> Once the Disputed Awardees have Fire Boss aircraft capable of performing the contract, the Solicitation has a method to publish Solicitations for additional awards and those offerors can submit offers at that point. That is what the terms of the Solicitation allow for ....

Pl. MJAR at 27. This concession, of course, means that Aero Spray, in any event: (1) could not stop the Agency from adding additional contractors (in line with the Court's hypothetical, *see supra* Section II.D); and (2) even assuming the Defendant-Intervenors should not have received initial contract awards — a question this Court does not reach — any harm to Aero Spray would be highly limited in duration. Indeed, with respect to the latter point, Aero Spray does not contest that both Fletcher Flying and Henry's Aerial have since readied at least two aircraft each, in compliance with the Solicitation. ECF No. 43 ¶¶ 3–4; ECF No. 45.[46] At this point in time, then — and given Aero Spray's admission about the Agency's available contractual method for adding contractors — there would be little point to enjoining the awards to Defendant-Intervenors or for remanding this matter to the Agency to add awardees.[47]

46 Because the Court does not reach the merits of Aero Spray's claims, the Court concludes that the pending motions to supplement the administrative record are moot. Nevertheless, the Court considers the additional documentation the parties provided, but only in terms of the remaining injunctive relief factors addressed in this section of the Court's decision.

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47 Although the Court repeats that it does not reach the merits of Aero Spray's claims, Aero Spray's prejudice case is all but fundamentally undermined by its admission regarding the onboarding process. The mere fact that the government may add contractors (and their aircraft) — and has determined a present need for them — means that Aero Spray cannot demonstrate that it would have remained free from additional competition at this point in the performance of its IDIQ contract. *See* Henry's MJAR at 20 (correctly highlighting, in the Court's view, that Aero Spray's claimed injury is "narrow[ed] ... to competing for task orders with contractors who did not have planes in contract configuration at some arbitrary, [Aero Spray]-selected time before the post-award inspection necessary" or "even smaller than that" to the extent it would suffer such an injury only "until BLM solicits new proposals" and awards new contracts).

In sum, this Court would deny Aero Spray's request for injunctive relief even if the Court had ruled for Aero Spray on the merits of its pending complaint.

CONCLUSION

For all the above reasons, the Court **GRANTS** Defendant's and Defendant-Intervenors' motions to dismiss pursuant to RCFC 12(b)(1) and, in the alternative, pursuant to RCFC 12(b)(6); the Court **DENIES** Aero Spray's motion for judgment on the administrative record. Additionally, the Court **DENIES** the pending motions to supplement the administrative record as **MOOT**. Accordingly, the Clerk is directed to enter **JUDGMENT** for Defendant and Defendant-Intervenors, dismissing this case.

***27 IT IS SO ORDERED**.

All Citations

--- Fed.Cl. ----, 2021 WL 5023371

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2021 WL 4099667
Only the Westlaw citation is currently available.
United States Court of Federal Claims.

LAND SHARK SHREDDING, LLC, Plaintiff,

v.

The UNITED STATES, Defendant.

No. 19-711C

|

(Filed: September 9, 2021) [*]

[*] **Opinion originally filed under seal on August 30, 2021**

Synopsis

Background: Limited liability company (LLC) brought bid protest challenging government's cancellation of solicitation for shredding services at VA hospital that was set aside for service-disabled veteran-owned small businesses (SDVOSB). While action was pending, LLC sold assets, changed name, and lost SDVOSB status. LLC moved to substitute LLC with new name as real party in interest or, alternatively, to amend caption to reflect name change. Government moved to dismiss, contending that after asset sale and name change, LLC lacked standing.

Holdings: The Court of Federal Claims, Nancy B. Firestone, Senior Judge, held that:

[1] caption would be amended to reflect LLC's new name, but

[2] LLC, after asset sale, lacked standing to continue with bid protest because it was not complete successor-in-interest to LLC that submitted bid.

Motion of LLC to amend caption granted; motion of government to dismiss granted.

Procedural Posture(s): Motion to Dismiss for Lack of Standing; Motion for Substitution of Party; Motion for Judgment on Administrative Record.

West Headnotes (11)

[1] **Public Contracts** Parties; standing
United States Parties; standing

To demonstrate that it is an "interested party," as required for standing to bring a bid-protest action, a plaintiff must show that it (1) is an actual or prospective bidder and (2) possesses the requisite direct economic interest in the procurement. 28 U.S.C.A. § 1491(b)(1).

[2] **Public Contracts** Parties; standing
United States Parties; standing

Where a plaintiff is not an actual bidder on a federal contract solicitation, the plaintiff may nonetheless possess standing to bring a bid-protest action as a complete successor-in-interest that can stand in the shoes of the actual bidder.

[3] **Public Contracts** Parties; standing
United States Parties; standing

For a plaintiff to prove it has a direct economic interest in a procurement, as required for standing in a bid-protest action challenging the cancellation of a procurement, the plaintiff must establish that it had a substantial chance of receiving the contract but for the alleged errors in the procurement process. 28 U.S.C.A. § 1491(b)(1).

[4] **United States** Standing

Whether a plaintiff has standing is a jurisdictional issue, and the plaintiff bears the burden of proving standing to sue. U.S. Const. art. 3, § 2, cl. 1.

[5] **United States** Standing

When assessing standing, the court must accept as true all undisputed facts asserted in a plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff, but where jurisdictional

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facts are in dispute, the plaintiff must establish those facts by a preponderance of the evidence. U.S. Const. art. 3, § 2, cl. 1.

[6] **United States** Standing

Although most standing cases consider whether a plaintiff has standing when filing suit, an actual controversy must exist through all stages of the litigation, and the court therefore may consider post-filing evidence in assessing standing, which is jurisdictional. U.S. Const. art. 3, § 2, cl. 1.

[7] **Public Contracts** Parties; standing

United States Parties; standing

Court would amend case caption in bid-protest action to reflect legally changed name of plaintiff, a limited liability company (LLC), which sold its assets to different entity but expressly retained its interest in bid-protest action by excluding interest from asset sale, and which continued to be the real party in interest after the name change.

[8] **Public Contracts** Parties; standing

United States Parties; standing

After limited liability company (LLC) sold its assets and changed its name, LLC operating under new name without predecessor's assets was not complete successor-in-interest to prior LLC, which had brought bid-protest action challenging government's cancellation of solicitation for shredding services at VA hospital, and, thus, post-asset-sale LLC lacked standing to proceed with bid-protest action because it was not an interested party, even though same person owned LLC before and after sale and name change; after asset sale, LLC no longer owned assets or employed personnel that it did when it submitted quotation, which could thus no longer serve as basis of award to LLC, and LLC was no longer verified as a service-disabled veteran-owned small business (SDVOSB), as solicitation required. 28 U.S.C.A. § 1491(b)(1).

[9] **Public Contracts** Parties; standing

United States Parties; standing

In evaluating whether a follow-on entity has standing as a successor-in-interest to bring a bid protest based on a prior entity's bid proposal, a court looks at whether the actual bidder and the entity asserting standing are the same legal entity or business unit and whether the change in corporate structure or sale at issue affected the operational or financial resources that the entity asserting standing could devote to the subject contract. 28 U.S.C.A. § 1491(b)(1).

[10] **Public Contracts** Parties; standing

United States Parties; standing

In both pre- and post-award bid protests, a plaintiff must establish standing by demonstrating that it is an actual or prospective bidder. 28 U.S.C.A. § 1491(b)(1).

[11] **Public Contracts** Parties; standing

United States Parties; standing

After limited liability company (LLC) sold all of its assets, changed name, changed personnel, and was no longer verified as a service-disabled veteran-owned small business (SDVOSB), LLC could no longer establish that it had a substantial chance of receiving contract for shredding services at VA hospital that was subject of bid-protest action brought by LLC before changes to its business, and, thus, LLC lacked standing after changes to continue with action; LLC had sold trucks, bins, and shredding equipment that had been described in quotation, no longer employed personnel described in quotation, and no longer met solicitation's SDVOSB requirement. 28 U.S.C.A. § 1491(b)(1).

Attorneys and Law Firms

Joseph A. Whitcomb, Denver, CO, for plaintiff.

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Daniel B. Volk, Civil Division, United States Department of Justice, Washington, D.C., with whom were Brian M. Boynton, Acting Assistant Attorney General, Martin F. Hockey, Jr., Acting Director, and L. Misha Preheim, Assistant Director, for defendant. Natica Chapman Neely, Washington, D.C., of counsel.

Bid Protest; SDVOSB Set Aside; Solicitation Cancellation; Standing; Asset Sales; Actual Bidder; Successor-in-Interest

OPINION

FIRESTONE, Senior Judge.

***1** In this bid protest, plaintiff Land Shark Shredding, LLC, a service-disabled veteran-owned small business (SDVOSB), challenges the Department of Veterans Affairs' (VA) cancellation of a solicitation for document shredding services that was set aside for SDVOSBs. After completion of briefing on the government's motion to dismiss and the parties' cross motions for judgment on the administrative record, this case was stayed pending Land Shark's appeals to the United States Court of Appeals for the Federal Circuit of other bid protest actions involving issues related to this case. Following the Federal Circuit's January 11, 2021 decisions on those appeals, the court ordered supplemental briefing and held oral argument on June 3, 2021.

At oral argument, the parties informed the court that Land Shark had recently sold its name, its assets, and its government contracting and commercial business interests to two companies, and had changed its name to Disabled Veterans Security, LLC. The parties informed the court that these transactions would require, at minimum, amending the case caption. The government also raised questions of whether any entity had standing to bring this case. The court ordered supplemental briefing on these issues.

Now pending before the court are two new motions. Land Shark moves to substitute Disabled Veterans Security, LLC as the real party at interest in this case or, alternatively, amend the case caption to reflect Land Shark's new name. Mot. to Substitute at 1, ECF No. 43. The government has filed a second motion to dismiss, agreeing that the case caption should be amended but arguing that the case should be dismissed because Disabled Veterans is not an interested party and therefore lacks standing. 2d Mot. to Dismiss at 4-5, ECF No. 48.

For the reasons that follow, Land Shark's request that the case caption be amended to reflect its current name, Disabled Veterans Security, LLC is **GRANTED**. However, because Disabled Veterans is not a successor-in-interest to Land Shark for purposes of the shredding solicitation at issue and therefore lacks interested party status, the government's second motion to dismiss is **GRANTED**. The government's first motion to dismiss, ECF No. 14, the parties' cross motions for judgment on the administrative record, ECF Nos. 12, 14, and Land Shark's supplemental motion for judgment on the administrative record, ECF No. 25, are **DISMISSED AS MOOT**.

I. BACKGROUND

A. The Solicitation and Quotations

On March 15, 2019, the VA issued Solicitation No. 36C24119Q0163, requesting quotations for commercial document shredding services for the VA's Boston Medical Center and associated facilities under a firm, fixed-price contract to be performed for a one-year base period with four one-year options. AR207, AR210, ECF No. 11. For this procurement, the VA was required by 38 U.S.C. § 8127(d) to provide preferences to veteran-owned small businesses. Under what is known as the "Rule of Two," the VA must restrict competition for a contract to SDVOSBs or veteran-owned small businesses (VOSBs) "if the contracting officer has a reasonable expectation that two or more [SDVOSBs or VOSBs] will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States." *Id.* If the Rule of Two is satisfied, the contracting officer must issue the solicitation as an SDVOSB or VOSB set-aside. *Land Shark Shredding, LLC v. United States*, 842 F. App'x 594, 597 (Fed. Cir. 2021).

***2** The shredding services procurement in this case was originally set aside under the Rule of Two for VOSBs and was later changed to an SDVOSB set-aside by amendment. AR210, AR272, AR295. The evaluation criteria for submitted quotations included price, past performance, and technical considerations. AR211-12. Quotations were to be evaluated in accordance with Federal Acquisition Regulation (FAR) Part 13, *see* AR211, which provides the contracting officer "broad discretion in fashioning suitable evaluation procedures" on the basis established in the solicitation, 48 C.F.R. §

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13.106-2(b). Quotations were due by March 28, 2019 at 12:00 p.m. eastern standard time. AR215.

The VA received three quotations from SDVOSBs in response to the solicitation, but only Land Shark's quotation was timely. *See* AR470. Land Shark's proposed prices were close to double the VA's independent government cost estimate (IGCE) [1] for the shredding services, and far exceeded the (untimely) price proposals from the other SDVOSBs. *See* AR274 (revised IGCE), AR340-46 (Land Shark's price proposal), AR407-21 (untimely proposal from Document Security Solutions), AR441-46 (untimely proposal from Minuteman Technology Services).

1 "Generally, independent government estimates represent the agency's best estimate of the most reasonable current price of the products or services being procured." *Parcel 49C Ltd. P'ship v. United States*, 130 Fed. Cl. 109, 128 (2016) (internal alterations and quotation omitted). FAR 13.106-3(a)(2)(vi) permits an agency to use the IGCE in evaluating price reasonableness.

The solicitation also contained technical requirements regarding subcontracting. For offerors outside of the Boston, MA area intending to self-perform without subcontractors, the solicitation required the offeror to include an explanation as to how it would accomplish the shredding work in Massachusetts. AR212. Land Shark, based in Bowling Green, Kentucky, AR384, stated that it intended "to self-perform all contract work," AR376. Land Shark's quotation included 58 pages of general information regarding how it would perform, AR347-405, but did not include a separate explanation as to how it would accomplish the shredding work in Massachusetts, *see* AR472.

Land Shark's bid also contained conflicting information as to whether Land Shark would—despite its intent to self-perform—use subcontractors. AR376 ("LSS reserves the right (when necessary) to utilize the services of a qualified Teaming Partner/Subcontractor."), AR377 ("However, we still must properly compensate our subcontractor. Therefore, to remain compliant with 13 CFR 125.6 we have to double what a subcontractor charges us – which results in a higher price ...."). For offerors planning to subcontract some or all of the work, the solicitation required the offeror to "please provide the name and address([e]s) of all subcontractor(s), a description of the planned subcontracting effort, and the subcontractor's experience to meet the requirements of the PWS [(performance work statement)]." AR212 (emphasis omitted). Land Shark did not include this information in its quotation. *See* AR472.

B. The Contracting Officer's Cancellation Decision

In an April 24, 2019 memorandum, the contracting officer cancelled the solicitation, citing pricing and technical deficiencies in Land Shark's quotation, the only timely bid. AR470. First, the contracting officer concluded that the pricing proposal submitted by Land Shark was not "fair and reasonable." AR471. The contracting officer noted that the pricing submitted by Land Shark was nearly double the agency's available funding and the IGCE and far exceeded the other untimely SDVOSB quotes received in response to the solicitation. *Id.*

***3** As for the technical portions of Land Shark's bid, the contracting officer determined that Land Shark had shown that "it has the experience to meet the requirement." AR472. However, the contracting officer determined that Land Shark's quotation contained "inconsistent information" regarding whether Land Shark would self-perform or use subcontractors. *Id.* The contracting officer found that, if it intended to self-perform, Land Shark "did not indicate how it would accomplish document shredding in Massachusetts as required by the solicitation." *Id.* The contracting officer further found that, if it intended to use subcontractors, "Land Shark did not provide the name and address(es) of the subcontractor(s), a description of the planned subcontracting effort, and the subcontractor's experience to meet the requirements of the PWS as required by the solicitation." *Id.* The contracting officer therefore concluded that Land Shark's technical quote was unacceptable. *Id.* For these reasons, the contracting officer cancelled the solicitation. AR473.

C. The Parties' Initial Briefing in This Court

On May 14, 2019, Land Shark filed a complaint in this court, challenging the cancellation of the solicitation on the grounds that the contracting officer's determination regarding Land Shark's pricing lacked a rational basis and violated the Rule of Two. *See* Compl. ¶¶ 27-50, ECF No. 1. On June 19, 2019, Land Shark filed a motion for judgment on the administrative record, challenging only the pricing aspect of the contracting officer's cancellation decision and arguing that, under the Rule of Two, the contracting officer was required to award Land Shark the shredding contract. *See* Pl.'s Mot. at 3-5, ECF No. 12.

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On July 12, 2019, the government filed its first motion to dismiss combined with a cross motion for judgment on the administrative record and response to Land Shark's motion. Def.'s Cross-Mot. at 1, 3, ECF No. 14. The government argued, inter alia, that Land Shark had failed to challenge the contracting officer's determination that Land Shark's quotation was technically deficient, which disqualified Land Shark's quotation from consideration and served as a basis to dismiss Land Shark's claim for lack of standing. *Id.* at 4-7.

As part of the briefing that followed, Land Shark requested that it be permitted to amend its complaint to challenge the contracting officer's findings regarding technical unacceptability. *See* Order at 1, ECF No. 19. The court allowed Land Shark to do so and ordered that the parties submit supplemental briefing. *Id.*; *see* Am. Compl. at 13, ECF No. 24 (adding a count challenging the technical acceptability determination).

The parties' supplemental briefing was completed on September 24, 2019. In its briefs, Land Shark generally argued that because its quotation was made at a fair and reasonable price, the government was required by the Rule of Two to award Land Shark the shredding contract. *See, e.g.*, Pl.'s Mot. at 8-14. Although conceding that its quotation did not include specific subcontractor information, Land Shark contended that its proposal met all of the solicitation's technical requirements. *See, e.g.*, Pl.'s Supp. Reply at 1-4, ECF No. 27. For its part, the government argued that because Land Shark's proposal did not meet the technical requirements of the solicitation, Land Shark did not have the requisite direct economic interest to bring this case and for this reason lacked standing. *See, e.g.*, Def.'s Cross-Mot. at 4-7. The government further argued that the VA's cancellation of the solicitation was rational based on the noted pricing and technical defects in Land Shark's quotation. *See, e.g.*, *id.* at 8-14.

D. Related Federal Circuit Decisions and Supplemental Briefs

Following briefing in this case, Land Shark filed notices of appeal in two other bid protests before this court involving the application of the Rule of Two. [2] *See* Order, ECF No. 31. On December 18, 2019, this court stayed this case pending the Federal Circuit's decisions in Land Shark's appeals. *Id.*

[2] Land Shark has also filed three other bid protests before this court that are still pending, making similar allegations regarding the Rule of Two. These cases are currently stayed pending the resolution of this and other cases. *See* Order Staying Case, *Land SharkShredding, LLC v. United States*, Nos. 19-1719C, 19-1741C, ECF No. 10; Order, *Land Shark Shredding, LLC v. United States*, No. 19-1852, ECF No. 10.

***4** On January 11, 2021, the Federal Circuit issued decisions rejecting Land Shark's two appeals. *Land Shark Shredding, LLC v. United States*, 842 F. App'x 589, 590 (Fed. Cir. 2021); *Land Shark Shredding, LLC v. United States*, 842 F. App'x 594, 595 (Fed. Cir. 2021). The parties then submitted a second round of supplemental briefing regarding the effect of these decisions on Land Shark's claims. *See generally* Pl.'s 2d Supp. Br., ECF No. 36; Def.'s 2d Supp. Br., ECF No. 37.

E. Additional Briefing Regarding the Sale of Land Shark's Name, Assets and Business Interests

The court held oral argument on June 3, 2021. At the oral argument, the parties informed the court that Land Shark had recently sold its name, assets, and business interests, and that these transactions raised questions regarding whether the case caption should be amended to reflect Land Shark's new name, Disabled Veterans Security, LLC; whether a new party should be substituted as the real party in interest; and whether any entity had standing to bring this case. *See* Tr. 6:17-7:12, 13:11-16:25, ECF No. 47. Accordingly, the court ordered another round of supplemental briefs. Order, ECF No. 42.

On June 14, 2021, Land Shark moved to substitute Disabled Veterans Security, LLC as the plaintiff or, in the alternative, to amend the case caption to reflect its new name. Mot. to Substitute at 1. Land Shark attaches to its supporting briefs documents regarding its name change and the sale of its assets. *Id.*, Exs. 1-9; Pl.'s Resp. & Reply, Ex. 1, ECF No. 50. The following facts are taken from Land Shark's and the government's briefs on this issue and are undisputed.

Land Shark explains that on December 15, 2020, Dunlap Government Services, LLC, a certified SDVOSB, acquired from Land Shark all assets necessary to perform Land Shark's government contracting business. Mot. to Substitute at 2; *see also id.*, Ex. 1 at 1 (Asset Purchase Agreement); *id.*, Ex. 1 at 34 (Second Amendment to Asset Purchase Agreement noting that Land Shark intended to sell "all assets ... necessary to perform" its federal contracting business). These assets included equipment, such as shredding trucks, *id.*, Ex. 1 at 34-35 (Second Amendment to Asset Purchase Agreement listing assets), as well as Land Shark's ongoing government

contracts, *id.* at 3, Ex. 1 at 1 (Section 1.01), Ex. 2 at 1, 11-20 (Novation Agreement listing contracts). The sale excluded contested government contracts including the one at issue in this case, *id.* at 3, Ex. 1 at 1 (Section 1.02), 20 (Schedule 1.02), but gave Dunlap the option to purchase any awarded contested government contracts from Land Shark, *id.*, Ex. 1 at 9-10 (Section 8.07). Under the agreement, Land Shark is barred from seeking new shredding contracts with the federal government for five years. *Id.* at 3, Ex. 1 at 8-9 (Section 8.04).

Then, through another asset purchase agreement dated December 31, 2020, Land Shark sold its commercial shredding business, including its name and "all of its remaining assets," to Underground Vaults and Storage, Inc. Pl.'s Resp. & Reply at 2 n.2, Ex. 1 at 6; *see also* 2d Mot. to Dismiss at 1-4. According to a press release about this sale, Land Shark's Vice President of Operations and five other Land Shark employees now work for Underground Vaults. 2d Mot. to Dismiss at 1 (quoting a January 4, 2021 press release by Underground Vaults).

***5** Following these sales, on January 22, 2021 Land Shark changed its name to Disabled Veterans Security, LLC. Mot. to Substitute at 3, Ex. 8 (Articles of Amendment changing Land Shark's name). According to Land Shark, Disabled Veterans is in the process of verifying its SDVOSB status. Pl.'s Resp. & Reply at 3. Like Land Shark, Disabled Veterans is a single-member limited liability corporation owned by Donald Gerard, Jr. *Id.* at 7; Mot. to Substitute at 1.

Because of these various transactions, Land Shark moves to substitute Disabled Veterans as the real party in interest or to amend the case caption to reflect its name change. Mot. to Substitute at 1. It argues that substitution or amendment is appropriate because the name change "resulted in no actual change to its organizational structure," *id.* at 5, and, therefore, nothing prevents Disabled Veterans "from continuing the present case" or from competing for the shredding solicitation at issue, *id.* at 1.

On June 25, 2021, the government filed a second motion to dismiss and response to Land Shark's motion to substitute. The government agrees with Land Shark that the case caption should be amended to reflect Land Shark's new name. 2d Mot. to Dismiss at 4. However, the government argues that Land Shark—now operating as Disabled Veterans—lacks standing to bring this case because, due to the sale of its assets and businesses to Underground Vaults and Dunlap, "no entity remains in a position where it could fill the shoes of the former Land Shark Shredding, LLC with respect to the quotation it submitted in March 2019." *Id.* at 7. The government also points out that "Disabled Veterans Security, LLC has not been verified as an SDVOSB," and would therefore be ineligible to compete. *Id.* at 8.

In response, Land Shark argues that Disabled Veterans may step into the shoes of Land Shark because Disabled Veterans has the same corporate structure and leadership. Pl.'s Resp. & Reply at 7. Land Shark further argues that Disabled Veterans can satisfy the terms of Land Shark's prior quotation because its organizational structure remains the same, because it can "purchase necessary equipment," and because it "intends to subcontract" the shredding work. *Id.*

Briefing was completed on August 10, 2021. The court has determined that oral argument is not necessary.

II. LEGAL STANDARDS

Standing in this case is framed by 28 U.S.C. § 1491(b)(1), which provides this court jurisdiction over bid protests. *Asset Prot. & Sec. Servs., LP v. United States*, 5 F.4th 1361, 1364 (Fed. Cir. 2021). Under § 1491(b)(1), bid protests may only be brought by "interested parties" that are prejudiced by the procuring agency's action. *CliniComp Int'l, Inc. v. United States*, 904 F.3d 1353, 1358 (Fed. Cir. 2018).

[1] **[2]** **[3]** To demonstrate that it is an "interested party," a plaintiff must show that it "(1) is an actual or prospective bidder and (2) possess[es] the requisite direct economic interest" in the procurement. *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009) (internal quotation omitted). As to the first requirement, where a plaintiff is not an "actual bidder" on the solicitation, a plaintiff may nonetheless possess standing as a "complete successor-in-interest" that can "stand in the shoes" of the actual bidder. *Universal Prot. Serv., LP v. United States*, 126 Fed. Cl. 173, 187 (2016); *L-3 Commc'ns Integrated Sys., LP v. United States*, 84 Fed. Cl. 768, 779 (2008) (citing *Ala. Aircraft Indus., Inc. v. United States*, 83 Fed. Cl. 666, 682 (2008), *rev'd on other grounds*, 586 F.3d 1372 (Fed. Cir. 2009)); *Centerline Logistics Corp. v. United States*, 148 Fed. Cl. 332, 336 (2020). As to the second requirement, to prove a "direct economic interest" in bid protest cases challenging the cancellation of a procurement, a plaintiff must establish that it had a "substantial chance" of receiving the contract but for the alleged errors in the procurement process. *Veterans Electric, LLC v. United States*, 138 Fed. Cl. 781, 790 (2018).

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***6** **[4]** **[5]** **[6]** Whether a plaintiff has standing is a jurisdictional issue, and the plaintiff bears the burden of proving standing to sue. *Universal Prot.*, 126 Fed. Cl. at 184-85. When assessing standing, "a court must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011). However, where jurisdictional facts are in dispute, a plaintiff must establish those facts by a preponderance of the evidence. *Sci. Applications Int'l Corp. v. United States*, 102 Fed. Cl. 644, 651 (2011). Although most standing cases consider whether a plaintiff has standing when filing suit, an "actual controversy" must exist through "all stages" of the litigation. *Acetris Health, LLC v. United States*, 949 F.3d 719, 726 (Fed. Cir. 2020) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91, 133 S.Ct. 721, 184 L.Ed.2d 553 (2013)). The court therefore may consider post-filing evidence in assessing jurisdiction. *See id.*

III. DISCUSSION

[7] As an initial matter, both parties agree that the case caption should be amended to reflect Land Shark's legally changed name, Disabled Veterans Security, LLC. Mot. to Substitute at 1, Ex. 8; 2d Mot. to Dismiss at 4-5. The court agrees that amending the case caption, rather than substituting Disabled Veterans as a party, is appropriate. Land Shark retained its interest in this case when the contested solicitation was excluded from the asset sale to Dunlap, and then changed its name to Disabled Veterans. Mot. to Substitute at 3, Ex. 1 at 1 (Section 1.02), Ex. 8. Even though Dunlap may purchase any contract awarded out of the contested solicitation, *id.*, Ex. 1 at 9 (Section 8.07), neither party argues that Dunlap (or Underground Vaults) can currently claim an interest in this case, *see* 2d Mot. to Dismiss at 5. The court therefore agrees with the parties that Land Shark, now operating under the name Disabled Veterans Security, LLC, continues to be the real party in interest. *See id.*; Pl.'s Resp. & Reply at 1. Accordingly, Land Shark's motion to amend the case caption to reflect this new name, the alternative relief requested in its motion to substitute, is granted.

[8] The court now turns to the question of whether Disabled Veterans has standing as an interested party to bring this case. In its motion to dismiss, the government argues that Disabled Veterans does not satisfy either prong of the "interested party" test because Disabled Veterans (1) was not an actual bidder on the March 2019 shredding solicitation and cannot establish that it is a complete successor-in-interest to Land Shark, and (2) also cannot establish that it stands a substantial chance of contract award. 2d Mot. to Dismiss at 6-9. Land Shark admits that Disabled Veterans is not an actual bidder on the solicitation or a complete successor-in-interest to Land Shark, but argues that it can nevertheless step into the shoes of Land Shark, for purposes of this litigation, because it has the same corporate structure, would honor the price listed on Land Shark's quotation, has the same technical capabilities as Land Shark, may purchase any necessary equipment to perform the contract, and can subcontract the work. Pl.'s Resp. & Reply at 5-9.

[9] **[10]** After careful consideration of these arguments, the court agrees with the government that Land Shark, now operating as Disabled Veterans, lacks standing as an interested party to continue this lawsuit. [3] It is undisputed that Disabled Veterans was not an "actual or prospective bidder" on the solicitation at issue in this case, as required to demonstrate standing as an interested party under § 1491(b)(1). *Asset Prot.*, 5 F.4th at 1365. Nevertheless, Land Shark may establish Disabled Veterans' standing by demonstrating that Disabled Veterans can "stand in the shoes" of Land Shark as Land Shark's "complete successor-in-interest." *Universal Prot.*, 126 Fed. Cl. at 187 ("[E]ven if a bidder did not submit a proposal, if it is the complete successor-in-interest to the actual offeror, the bidder may stand in the shoes and have standing to bring a protest."); *Centerline*, 148 Fed. Cl. at 336 ("[T]he inquiry is whether the follow-on entity is the complete successor-in-interest to the actual offeror." (internal quotation omitted)); *L-3 Commc'ns*, 84 Fed. Cl. at 779 (citing *Ala. Aircraft*, 83 Fed. Cl. at 682). In evaluating "successor-in-interest" status, this court looks to such factors as whether the actual bidder and the entity asserting standing are the same legal entity or business unit, *Ala. Aircraft*, 83 Fed. Cl. at 682; *Centerline*, 148 Fed. Cl. at 336 (evaluating "indicia such as merger, corporate reorganization, the sale of an entire business or the sale of an entire portion of a business"); *L-3 Commc'ns*, 84 Fed. Cl. at 778-79 (finding standing where the new entity "embraces the identical business unit which submitted" the original bid), and whether the change in corporate structure or sale at issue affected the "operational" or "financial" resources that the entity asserting standing could devote to the subject contract, *Ala. Aircraft*, 83 Fed. Cl. at 682-84; *Universal Prot.*, 126 Fed. Cl. at 193 (dismissing for lack of standing where the plaintiff "lack[ed] all of the resources" referenced by the actual bidder's proposal). [4]

[3] The United States Supreme Court has stated that "[t]he doctrine of standing generally assesses

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whether [the requisite interest in a dispute] exists at the outset [of the litigation], while the doctrine of mootness considers whether it exists throughout the proceedings." *Uzuegbunam v. Preczewski*, —— U.S. ——, 141 S. Ct. 792, 796, 209 L.Ed.2d 94 (2021). Because the court is evaluating whether Disabled Veterans has demonstrated interested party status under § 1491(b)(1), the court analyzes jurisdiction for purposes of this opinion under the standing doctrine. However, the court's holding could also be framed under the mootness doctrine. Because Land Shark, operating as Disabled Veterans, no longer possesses the requisite interested party status to bring this case, the court cannot provide Land Shark with effectual relief, and the case is moot. *See Uzuegbunam*, 141 S. Ct. at 796; *see also Acetris*, 949 F.3d at 726-27 (determining that a portion of the case was "moot" because the plaintiff did "not now have standing" to challenge the solicitation at issue). Under either doctrine, this case must be dismissed for lack of jurisdiction.

4 Land Shark attempts to distinguish these cases on the ground that they involved post-award bid protests, while this case involves a pre-award cancellation. Pl.'s Resp. & Reply at 2 n.1. The court sees no basis for this distinction. In both pre- and post-award bid protests, a plaintiff must establish standing by demonstrating that it is an "actual or prospective bidder." *See e.g.*, *Veterans Electric*, 138 Fed. Cl. at 790 (pre-award cancellation).

***7** In this case Land Shark has failed to provide sufficient evidence that Disabled Veterans could "stand in the shoes" of Land Shark as a complete successor-in-interest with regard to Land Shark's submitted quotation. *Universal Prot.*, 126 Fed. Cl. at 187. Based on the undisputed facts described above, Land Shark, now operating as Disabled Veterans, no longer owns the assets or employs the personnel that it did when it submitted its quotation in March 2019. Because of this, Land Shark itself "concedes that [Disabled Veterans] is not a complete successor-in-interest to Land Shark." Pl.'s Resp. & Reply at 5-6. Under this court's precedent, therefore, Disabled Veterans "has no right to proceed" with this case. *Centerline*, 148 Fed. Cl. at 336.

In addition to this concession, Land Shark has failed to demonstrate that Disabled Veterans has the operational resources that would allow it to perform the shredding solicitation at issue in accordance with Land Shark's quotation. Land Shark admits that it has sold all of its assets to Dunlap and Underground Vaults and provides no evidence or argument that Disabled Veterans has since acquired its own assets. Pl.'s Resp. & Reply at 2 n.2. Therefore, the quotation submitted by Land Shark for the March 2019 shredding solicitation cannot now apply to Disabled Veterans. For example, the "Capabilities Statement" and "Technical Proposal" in Land Shark's March 2019 quotation describe Land Shark's available trucks, bins, and shredding equipment. AR350, AR355. However, Land Shark sold its trucks, bins, and shredding equipment to Dunlap and Underground Vaults. Pl.'s Resp. & Reply, Ex. 1 at 6 (selling "4 mobile shred trucks," "Tubs and consoles," a "Plant-based shredder/baler/conveyor system," and "all inventory, supplies, office furniture, computers, software, and other tangible assets" to Underground Vaults); Mot. to Substitute, Ex. 1 at 34 (Second Amendment to Asset Purchase Agreement with Dunlap, listing sold vehicles and bins). Land Shark's quotation, therefore, does not describe the assets and capabilities of Disabled Veterans, but the resources of a company that no longer exists. *See Universal Prot.*, 126 Fed. Cl. at 193 (dismissing for lack of standing where the plaintiff "appears to lack all of the resources" relied on in the original proposal); *Centerline*, 148 Fed. Cl. at 336 (dismissing for lack of standing where there was no representation that the plaintiff "inherited sufficient assets of [the actual bidder] to perform").

[11] Likewise, the employees described in Land Shark's "Capabilities Statement" and "Technical Proposal" do not appear to work for Disabled Veterans. According to a press release regarding Land Shark's sale of its commercial business, one of the key employees listed in Land Shark's "Capabilities Statement" under its "Expertise Summary," as well as five of its other employees, now work for Underground Vaults. 2d Mot. to Dismiss at 1; AR350 (Capabilities Statement); AR354-55 (describing the qualifications of Land Shark's service personnel); *see also Universal Prot.*, 126 Fed. Cl. at 191 (holding that the plaintiff had not established successor-in-interest status where "key personnel" listed in the proposal to the solicitation were no longer employed by the plaintiff). In fact, it is unclear to the court whether Disabled Veterans has any employees or management at all to devote to the shredding contract, apart from its owner, Mr. Gerard, Jr. In addition, while stating that Disabled Veterans is in the process of becoming SDVOSB verified, Pl.'s Resp. & Reply at 3, Land Shark has failed to show that Disabled Veterans has achieved SDVOSB status such that it could compete for the contract at issue. [5] In short,

there is no quotation in the record that could serve as the basis for an award to Disabled Veterans.

5 For these reasons, the court also agrees with the government, 2d Mot. to Dismiss at 8, that Land Shark has not established that Disabled Veterans has a "substantial chance" of being awarded the shredding contract, the second requirement for demonstrating interested party status under § 1491(b)(1). *Veterans Electric*, 138 Fed. Cl. at 790.

***8** Land Shark argues that Disabled Veterans may nonetheless "stand in the shoes" of Land Shark because Disabled Veterans has the same corporate structure as Land Shark, could purchase the necessary equipment, and could subcontract the shredding work. Pl.'s Resp. & Reply at 5-9. Yet, more is needed to demonstrate complete successor-in-interest status. That Disabled Veterans may eventually be able to obtain the resources to perform the shredding contact at issue does not demonstrate that Disabled Veterans has the same financial and operational resources as Land Shark, such that it could provide the assets and services promised in Land Shark's previously submitted quotation. *See Universal Prot.*, 126 Fed. Cl. at 187 (dismissing for lack of standing where the plaintiff could not offer "an identical proposal" to that submitted by the actual bidder). As discussed above, based on the undisputed facts surrounding Land Shark's asset sales, Disabled Veterans is not able to "stand in the shoes" of Land Shark for the purposes of the challenged solicitation.

Moreover, Land Shark's contention that Disabled Veterans could subcontract the solicited shredding work, Pl.'s Resp. & Reply at 7, contradicts Land Shark's statement in its quotation that the "intent of Land Shark Shredding (LSS) is to self-perform all contract work." AR376. These contradictory statements additionally confirm that any award to Disabled Veterans could not be grounded in Land Shark's prior quotation.

Based on the undisputed facts described above, Disabled Veterans cannot demonstrate that it is a complete successor-in-interest to Land Shark. Disabled Veterans therefore has not established standing as an interested party. Accordingly, the case must be dismissed for lack of jurisdiction.

IV. CONCLUSION

For the foregoing reasons, Land Shark's motion to amend the case caption, ECF No. 43, to reflect its current name, Disabled Veterans Security, LLC, is **GRANTED**. However, because Disabled Veterans lacks interested party status, the government's second motion to dismiss, ECF No. 48, is **GRANTED**. The government's first motion to dismiss, ECF No. 14, the parties' cross motions for judgment on the administrative record, ECF Nos. 12, 14, and Land Shark's supplemental motion for judgment on the administrative record, ECF No. 25, are **DISMISSED AS MOOT**. No costs. After amending the case caption, the Clerk is directed to enter judgment accordingly. The caption of the judgment shall reflect Disabled Veterans Security, LLC as the plaintiff.

IT IS SO ORDERED.

All Citations

--- Fed.Cl. ----, 2021 WL 4099667

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Squire Solutions, Inc. v. United States, Fed.Cl., September 30, 2021

155 Fed.Cl. 84
United States Court of Federal Claims.

OAK GROVE TECHNOLOGIES, LLC, Plaintiff,
v.
The UNITED STATES, Defendant,
and
F3EA, Inc., Defendant-Intervenor.

No. 21-775C
|
(Filed Under Seal: August 2, 2021)
|
(Reissued: August 16, 2021)

Synopsis

Background: Unsuccessful offeror filed bid protest challenging decision by United States to award Army Special Operations Force contract to successful offeror. Successful offeror intervened. Government moved to dismiss for lack of standing. Unsuccessful offeror moved, and government and successful offeror cross-moved, for judgment on the administrative record. Unsuccessful offeror also moved for a preliminary injunction.

Holdings: The Court of Federal Claims, Matthew H. Solomson, J., held that:

[1] unsuccessful offeror had standing to file bid protest;

[2] government improperly filed administrative record;

[3] government acted arbitrarily in finding that successful offeror submitted a compliant, awardable proposal;

[4] government acted arbitrarily in finding that another offeror submitted a compliant, awardable proposal;

[5] government's failure to engage in discussions was arbitrary and capricious;

[6] government's conduct in investigating allegations of misconduct by procurement official was arbitrary and capricious; and

[7] unsuccessful offeror would suffer irreparable harm absent a preliminary injunction.

Motions granted in part and denied in part. Cross motions denied.

Procedural Posture(s): Motion to Dismiss for Lack of Standing; Motion for Judgment on Administrative Record; Motion for Preliminary Injunction.

West Headnotes (48)

[1] **Public Contracts** Parties; standing
United States Parties; standing

Unsuccessful offeror had standing to file bid protest challenging government decision to award government contract to successful offeror; unsuccessful offeror was an actual offeror, it submitted a timely proposal, it alleged that other offerors were ineligible for a contract award, and it alleged that, but for government's various arbitrary and capricious actions in conducting procurement, such as overlooking successful offeror's failure to include required teaming agreement with its proposal, as well as significant performance risk posed by cost/price volume of another offeror's proposal, unsuccessful offeror would have had a substantial chance of receiving contract award, as government would otherwise have to re-solicit contract due to lack of eligible offerors. 28 U.S.C.A. §§ 1491(b), 1491(b)(1).

[2] **Public Contracts** Parties; standing
United States Parties; standing

An interested party, for purposes of standing under the Tucker Act, is an actual or prospective bidder whose direct economic interest would be affected by the award of the contract. 28 U.S.C.A. § 1491(b)(1).

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[3] **Public Contracts** Parties; standing

United States Parties; standing

To satisfy the direct economic interest requirement in order to have standing under the Tucker Act to file a post-award bid protest, a plaintiff must show that there was a substantial chance it would have received the contract award but for the alleged error in the procurement process. 28 U.S.C.A. § 1491(b)(1).

[4] **United States** In general; establishment and jurisdiction

Standing is a threshold jurisdictional issue.

[5] **Public Contracts** Parties; standing

United States Parties; standing

Even when an agency has determined that offeror is technically unacceptable, that alone does not vitiate offeror's standing to challenge results of procurement under Tucker Act. 28 U.S.C.A. § 1491(b).

[6] **Public Contracts** Parties; standing

United States Parties; standing

A bidder has an economic interest and therefore standing under the Tucker Act to challenge a contract award where, if the offeror's bid protest were allowed because of an arbitrary and capricious responsibility determination by the contracting officer, the government would be obligated to rebid the contract, and the bidder could compete for the contract once again. 28 U.S.C.A. § 1491(b)(1).

[7] **Public Contracts** Parties; standing

United States Parties; standing

In cases where there are more than two offerors, a bid protestor will have standing under the Tucker Act to allege that it has a substantial chance of being awarded the contract if its allegations regarding the proposals of offerors who may be next in line for award are potentially meritorious. 28 U.S.C.A. § 1491(b)(1).

[8] **Public Contracts** Parties; standing

United States Parties; standing

Before reaching the merits of the parties' dispute in a bid protest, the Court of Federal Claims conducts only a limited review of the plaintiff's allegations and the administrative record for the minimum requisite evidence necessary for plaintiff to demonstrate prejudice and therefore standing under the Tucker Act. 28 U.S.C.A. § 1491(b)(1).

[9] **Public Contracts** Parties; standing

United States Parties; standing

At the standing inquiry point of a bit protest, the Court of Federal Claims assumes the well-pled allegations of error to be true. 28 U.S.C.A. § 1491(b)(1).

[10] **United States** Judgment on administrative record

Judgment on the administrative record before the Court of Federal Claims is properly understood as intending to provide for expedited trial on the record. RCFC, Rule 52.1.

[11] **United States** Judgment on pleadings

The rule governing motions for judgment on the pleadings requires the Court of Federal Claims to make factual findings from the record evidence as if it were conducting a trial on the record. RCFC, Rule 52.1.

[12] **United States** Judgment on pleadings

On a motion for judgment on the pleadings, he Court of Federal Claims asks whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the record evidence. RCFC, Rule 52.1.

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[13] **United States** Scope of inquiry; findings or report and determination

Generally, in action brought pursuant to Tucker Act, Court of Federal Claims reviews agency's actions according to standards set forth in Administrative Procedure Act (APA). 5 U.S.C.A. § 706; 28 U.S.C.A. § 1491(b)(1).

[14] **Public Contracts** Scope of review

United States Scope of review

Pursuant to the Administrative Procedure Act's (APA) standard, the Court of Federal Claims considering a bid protest asks, whether the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.A. § 706(2); 28 U.S.C.A. § 1491(b)(1).

[15] **Public Contracts** Scope of review

United States Scope of review

In action brought pursuant to Tucker Act, Court of Federal Claims must determine whether (1) procurement official's decision lacked rational basis; or (2) procurement procedure involved violation of regulation or procedure. 28 U.S.C.A. § 1491(b)(1).

[16] **Public Contracts** Scope of review

Public Contracts Evidence

United States Scope of review

United States Evidence

When a bid protest is brought under the Tucker Act which alleges that the procurement official's decision lacked a rational basis, the test is whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion, and the disappointed bidder bears a heavy burden of showing that the award decision had no rational basis. 5 U.S.C.A. § 706(2); 28 U.S.C.A. § 1491(b)(1).

[17] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

When a bid protest is brought under the Tucker Act which alleges that the procurement procedure involved a violation of regulation or procedure, the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations. 5 U.S.C.A. § 706(2); 28 U.S.C.A. § 1491(b)(1).

[18] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

To establish prejudice in a post-award bid protest challenge, a protester must demonstrate that but for the alleged error, there was a substantial chance that it would receive an award, that it was within the zone of active consideration. 28 U.S.C.A. § 1491(b)(1).

[19] **Public Contracts** Scope of review

United States Scope of review

United States Sanctions

Government improperly filed administrative record in unsuccessful offeror's bid protest challenging government's award of a government contract, and thus was required to show cause why it should not be sanctioned for its conduct; government omitted from its initial and subsequent administrative record filings several critical documents which directly and unequivocally undermined its position, despite court's repeated directions that government ensure that filed administrative record was complete, and government provided no explanation for its omissions of critical documents, other than to argue that documents in question were not especially relevant, although several of those documents were decisively probative regarding which offeror's were eligible for contract awards. 28 U.S.C.A. § 1491(b)(1).

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1 Cases that cite this headnote

[20] **Public Contracts** Scope of review
United States Scope of review

In a procurement-related action, Court of Federal Claims is required to base its Administrative Procedure Act (APA) review of agency action on the full administrative record that was before the agency decision maker at the time he or she made a decision as to the contract award. 5 U.S.C.A. § 706(2); 28 U.S.C.A. § 1491(b)(1).

[21] **Public Contracts** Scope of review
United States Scope of review

Review function of the Court of Federal Claims in the context of a bid protest is undermined when an agency assembles a record that consists solely of materials that insulate portions of its decision from scrutiny or that it deems relevant to specific allegations raised by a protester. 28 U.S.C.A. § 1491(b)(1).

[22] **Public Contracts** Scope of review
United States Scope of review

Allowing a bid protest to be decided upon an administrative record which does not reflect what actually transpired would perpetuate error and impede and frustrate effective judicial review; simply put, an agency does not possess the discretion to make these records whatever it says they are. 28 U.S.C.A. § 1491(b)(1).

[23] **Public Contracts** Scope of review
United States Scope of review

In compiling the administrative record in a bid protest action, the government does not possess a unilateral veto over administrative record documents based on a self-serving conclusion that they are not relevant to the procurement decision under review. 28 U.S.C.A. § 1491(b)(1).

1 Cases that cite this headnote

[24] **Public Contracts** Scope of review
United States Scope of review

The "whole record" in a bid protest action consists of all the material that was developed and considered by the agency in making its decision. 28 U.S.C.A. § 1491(b)(1).

[25] **Public Contracts** Scope of review
United States Scope of review

Pursuant to the Administrative Procedure Act's (APA) arbitrary and capricious standard of review, where a bid protester challenges the procurement official's decision as lacking a rational basis, the court must determine whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion; this standard requires that the agency not only have reached a sound decision, but have articulated the reasons for that decision. 5 U.S.C.A. § 706(2); 28 U.S.C.A. § 1491(b)(1).

[26] **Public Contracts** Scope of review
United States Scope of review

Although agencies are entitled to exercise discretion upon a broad range of issues confronting them in the procurement process, a court should not defer to the agency's conclusory or unsupported suppositions. 5 U.S.C.A. § 706(2); 28 U.S.C.A. § 1491(b)(1).

[27] **Public Contracts** Scope of review
United States Scope of review

Court of Federal Claims will sustain bid protest where protester demonstrates that agency's decision entirely failed to consider important aspect of problem, offered explanation for its decision that runs counter to evidence before agency, or is so implausible that it could not be ascribed to difference in view or product of agency expertise. 5 U.S.C.A. § 706(2); 28 U.S.C.A. § 1491(b)(1).

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[28] **Public Contracts** Form and requisites; responsiveness

United States Form and requisites; responsiveness

Government acted arbitrarily in finding that successful offeror submitted a compliant, awardable proposal for government contract; although contract solicitation required that all bids provide an executed teaming agreement, successful offeror did not submit a teaming agreement with its proposal, government failed to enforce mandatory teaming requirement, which served a substantive and material purpose by ensuring that prime contractors could not simply claim capability and experience of another contractor for purpose of making an offeror's proposal more competitive, absent some concrete evidence that described team would actually perform awarded contract, and government did not consider successful offeror's failure to comply with teaming requirement in making its contract award decision. 5 U.S.C.A. § 706(2); 28 U.S.C.A. § 1491(b)(1); 48 C.F.R. § 9.601.

[29] **Public Contracts** Form and requisites; responsiveness

United States Form and requisites; responsiveness

A proposal for a government contract that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and a contract award based on such an unacceptable proposal violates the procurement statutes and regulations. 28 U.S.C.A. § 1491(b)(1).

[30] **United States** Scope of inquiry; findings or report and determination

An agency's failure to consider the issue or to exercise discretion absent any supporting rationale is, by definition, an abuse of discretion. 5 U.S.C.A. § 706(2).

[31] **Public Contracts** Form and requisites; responsiveness

United States Form and requisites; responsiveness

Government acted arbitrarily in finding that offeror submitted a compliant, awardable proposal for United States Army Special Operations Force contract; contract solicitation required government to evaluate financial responsibility of offeror's proposal by considering reasonableness and realism of proposal's cost/price volume, Defense Contract Management Agency (DCMA) explicitly recommended that offeror not be awarded contract due to its financial inability to complete contract, and there was no indication that government considered DCMA finding in making its decision as to whether offeror was eligible for contract award. 5 U.S.C.A. § 706(2); 28 U.S.C.A. § 1491(b)(1).

[32] **Public Contracts** Scope of review

United States Scope of review

Any post hoc rationales an administrative agency provides for its decision are not to be considered in the context of a bid protest; rather, the grounds upon which an administrative order must be judged are those upon which the record discloses that its actions are based. 5 U.S.C.A. § 706(2); 28 U.S.C.A. § 1491(b)(1).

[33] **Public Contracts** Evaluation process

United States Evaluation process

Post hoc rationales should not form the basis of administrative agency decision-making, for the purposes of a bid protest. 5 U.S.C.A. § 706(2); 28 U.S.C.A. § 1491(b)(1).

[34] **Public Contracts** Evaluation process

United States Evaluation process

Government's failure to engage in discussions or clarifications concerning procurement before awarding United States Army Special

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Operations Force contract was arbitrary and capricious, although contract solicitation included a provision noting that government reserved discretion to award contract without engaging in discussions; estimated value of contract was $245 million, government gave no explanation as to why discussions would be inappropriate in circumstances of procurement, inconsistent dating on relevant government memoranda made it unclear precisely when, and on what basis, government decided not to conduct discussions, and nearly all offerors submitted proposals that were not compliant with contract solicitation. 5 U.S.C.A. § 706(2); 10 U.S.C.A. § 2305(b)(4)(A)(ii); 28 U.S.C.A. § 1491(b)(1); 41 U.S.C.A. § 3703(a)(2); 48 C.F.R. §§ 2.101, 15.306, 15.306(d), 15.306(d)(3), 52.215-1, 215.209, 215.209(a), DFARS 215.306, 215.306(c), 215.306(c)(1).

1 Cases that cite this headnote

[35] **Public Contracts** Evaluation process

United States Evaluation process

While the general rule is that once offerors on a government contract are warned that the relevant agency intends to award without discussions, absent special circumstances, the contracting officer has the discretion to award without discussions, that does not mean that such discretion is plenary. 48 C.F.R. § 15.306(d)(3).

1 Cases that cite this headnote

[36] **Administrative Law and Procedure** Operation and Effect

Wherever a regulation provides the government with discretion to take or not to take an action, such discretion must be exercised reasonably and not in arbitrary and capricious manner. 5 U.S.C.A. § 706(2).

[37] **Public Contracts** Good faith; fairness

United States Good faith; fairness

Government's investigation into unsuccessful offeror's accusation that procurement official improperly influenced bidding process for government contract in favor of successful bidder was conducted in an arbitrary and capricious manner; despite evidence that successful offeror assisted in drafting language of government's contract solicitation and that official played multiple roles in procurement and reviewed his own work, government concluded its investigation after merely reviewing five written statements and conducting two in-person interviews, in which successful offeror's involvement in drafting solicitation language was categorically denied, and government totally obfuscated official's role in procurement until late in litigation arising from unsuccessful offeror's bid protest. 5 U.S.C.A. § 706(2); 28 U.S.C.A. § 1491(b)(1); 41 U.S.C.A. §§ 2101, 2102(a)(1).48 C.F.R. §§ 1.602-2, 9.505, 9.508.

[38] **Public Contracts** Scope of review

United States Scope of review

Court of Federal Claims considering a bid protest must analyze whether administrative agency conducted adequate investigation consistent with arbitrary and capricious standard of review. 5 U.S.C.A. § 706(2); 28 U.S.C.A. § 1491(b).

[39] **Public Contracts** Scope of review

United States Scope of review

Notwithstanding significant discretion vested in procurement officials, Court of Federal Claims must ascertain whether there exists rational connection between the facts found and the choice made on a public contract, for the purposes of its consideration of a bid protest. 5 U.S.C.A. § 706(2); 28 U.S.C.A. § 1491(b)(1).

[40] **Injunction** Injunctions against government entities in general

In evaluating whether permanent injunctive relief is warranted in a particular case, a court must consider: (1) whether the plaintiff has succeeded on the merits; (2) whether the plaintiff has shown irreparable harm without the issuance of the injunction; (3) whether the balance of the harms favors the award of injunctive relief;

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and (4) whether the injunction serves the public interest.

[41] **Injunction** Award of contract; bids and bidders

Unsuccessful offeror would suffer irreparable harm absent a preliminary injunction enjoining government from proceeding with its contract award to successful offeror; due to government's arbitrary and capricious actions in considering ineligible offerors for contract award, including successful offeror, unsuccessful offeror was denied opportunity to fairly compete for contract, which had a potential value of $245 million. 28 U.S.C.A. § 1491(b)(2); RCFC, Rule 65.

[42] **Injunction** Injunctions against government entities in general

In evaluating irreparable harm for the purposes of injunctive relief, relevant inquiry is whether plaintiff has adequate remedy in absence of injunction.

[43] **Injunction** Award of contract; bids and bidders

In bid protest context, lost opportunity to compete in fair competitive bidding process for contract is sufficient to demonstrate irreparable harm required for injunctive relief. 28 U.S.C.A. § 1491(b)(2).

[44] **Injunction** Award of contract; bids and bidders

The loss of potential profits from a government contract constitutes irreparable harm, for the purposes of injunctive relief. 28 U.S.C.A. § 1491(b)(2).

[45] **Injunction** Award of contract; bids and bidders

In balancing the harms of injunctive relief in the context of a bid protest, Court of Federal Claims ordinarily is required to give due regard to the interests of national defense and national security and the need for expeditious resolution of the action. 28 U.S.C.A. § 1491(b)(3).

[46] **Injunction** Award of contract; bids and bidders

Balance of harms weighed in favor of granting a preliminary injunction enjoining government from proceeding with its contract award to successful offeror; government agreed and later reaffirmed that court should make any relief ruling without regard to any cost or disruption from terminating, re-competing, or re-awarding contract, which unsuccessful offeror challenged on grounds that no bidding offerors, including successful offeror, were eligible for contract award, and parties agreed to cooperate to ensure a reasonable period of transition on any pending task orders that were being performed should there be a permanent injunction. 28 U.S.C.A. §§ 1491(b)(2), 1491(b)(3); RCFC, Rule 65.

[47] **Injunction** Award of contract; bids and bidders

Public interest favored granting a preliminary injunction enjoining government from proceeding with its contract award to successful offeror, which unsuccessful offeror challenged on grounds that no bidding offerors, including successful offeror, were eligible for contract award; public had an interest in integrity of federal procurement system as well as honest, open, and fair competition for government contracts, which improved overall value delivered to government in long term, there were substantial allegations of impropriety concerning government procurement official's actions during bid process, government's investigation into those allegations was patently deficient, and government failed to implement corresponding corrective action to which it had committed. 28 U.S.C.A. § 1491(b)(2); RCFC, Rule 65.

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[48] **Injunction** Award of contract; bids and bidders

The public interest favors granting an injunction in a bid protest, as the public always has an interest in the integrity of the federal procurement system. 28 U.S.C.A. § 1491(b)(2).

Attorneys and Law Firms

***90** Craig A. Holman, Arnold & Porter Kaye Scholer LLP, Washington, D.C., for Plaintiff. With him on the briefs were Thomas A. Pettit and Anna L. Dykema.

Joseph A. Pixley, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for Defendant. With him on the briefs were Brian M. Boynton, Acting Assistant Attorney General, Civil Division, Robert E. Kirschman, Jr., Director, Douglas K. Mickle, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., and Harry Parent, Contract & Fiscal Law Division, United States Army Legal Services Agency, Fort Belvoir, VA.

Joshua A. Mullen, Baker Donelson Bearman Caldwell & Berkowitz, PC, Nashville, TN, for Defendant-Intervenor. With him on the briefs was Adam K. Lasky, Seyfarth Shaw LLP, Seattle, WA.

OPINION AND ORDER

SOLOMSON, Judge.

The work of our nation's esteemed special forces is quite understandably shrouded in secrecy. In contrast, the Federal Acquisition Regulation ("FAR") requires our procurement system to be open and transparent. The problem in this case is that the government treated a procurement to support the special forces – and conducted this extended bid protest litigation – as if both were clandestine missions. The result is a procurement record that raises more questions than it answers. Indeed, the administrative record demonstrates, if anything, that Plaintiff, Oak Grove Technologies, Inc. ("OGT"), was not treated with the fairness the FAR requires. Moreover, the Court has serious doubts about the integrity with which the procurement at issue was conducted.

In particular, in this post-award bid protest, OGT challenges the decision of Defendant, the United States, acting by and through the Department of the Army ("Army" or the "Agency"), to award the Special Operations Forces Requirements Analysis, Prototyping, Training, Operations and Rehearsal IV ("SOF RAPTOR IV") contract to Defendant-Intervenor, F3EA, Inc. ("F3EA"). OGT contests that award as arbitrary, capricious, and otherwise not in accordance with law, including provisions of the FAR. The parties filed motions for judgment on the administrative record pursuant to Rule 52.1 of the Rules of the United States Court of Federal Claims ("RCFC"). The government also moved to dismiss OGT's complaint for lack of standing pursuant to RCFC 12(b)(1).

For the reasons explained below, the Court **DENIES** the government's motion to dismiss, **GRANTS** OGT's motion for judgment on the administrative record, and **DENIES** the government's and the defendant-intervenor's respective cross-motions for judgment on the administrative record. As a result, the Agency must fix this procurement. [*]

I. FACTUAL AND PROCEDURAL BACKGROUND [1]

A. The Solicitation

For years, the Army has utilized SOF RAPTOR contract vehicles for procuring training services for the United States Special Operations Command ("USSOCOM") and its component Special Operations Force ("SOF") commands. AR 1719. SOF RAPTOR provides USSOCOM with a "flexible contract vehicle capable of executing complex Full Mission Profile (FMP) exercises and rapid ***91** technology insertions" to assist with "conduct[ing] training, mission planning, preview, and rehearsal using a mix of live, virtual, and constructive simulation applications." *Id.* SOF RAPTOR III, the predecessor contract to the one at issue here, was awarded to a joint venture, Raptor Training Services, LLC, of which OGT and F3EA were both members. AR 3380. With SOF RAPTOR III set to expire, the Army issued, on October 30, 2018, Solicitation No. W900KK-19-R-0078, as a Request for Proposals (the "Solicitation" or the "RFP") for SOF RAPTOR IV. AR 1651, 1719. SOF RAPTOR IV is a 100% service disabled veteran owned small business ("SDVOSB") set-aside, providing for a single-award indefinite delivery indefinite quantity ("IDIQ") contract, with an order ceiling of $245,000,000. AR 1651-52, 1693. SOF RAPTOR IV contemplates a five-year base period and two, one-year option

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periods. AR 1687. Proposals were due December 14, 2018. AR 2576.

The RFP instructed offerors to submit proposals consisting of four volumes addressing different subjects: (1) capability; (2) past performance; (3) cost/price; and (4) administrative. AR 1695 (§ L.3.1). The RFP cautioned offerors that "[p]roposals shall be compliant with the full solicitation" and that failure to comply with solicitation requirements "may cause the proposal to be evaluated as non-compliant and ineligible for award." AR 1693 (§ L.1.7). The RFP emphasized, again, that "[f]ailure of an offeror to provide all requested proposal information may render the offeror's proposal as noncompliant and, as such, the offeror's proposal will not be evaluated," subject to the Procuring Contracting Officer's ("PCO") "sole discretion." AR 1695 (§ L.3.1).

The RFP required a FAR Part 15 "Best Value Subjective Tradeoff Process" with the caveat that "[a]ward may be made to other than the lowest priced Offeror or other than the highest technically rated Offeror." AR 1708 (§ M.2). The RFP informed offerors that the Army "does not intend to hold discussions, but reserves the right to do so, at the sole discretion of the PCO." AR 1708 (§ M.1.5). The RFP provided that the capability, past performance, and cost/price volumes would be evaluated in descending order of importance, and that "[a]ll non-price evaluation factors, when combined, are significantly more important" than cost/price. AR 1709 (§ M.3.1). While Section L contained detailed requirements for the administrative volume, the RFP did not provide Section M evaluation criteria specifically for that volume. *See id.*

1. Capability Volume

In the capability volume, offerors were required to address three technical subfactors: program management, crisis response force, and core competencies. AR 1697–1700 (§ L.4.0); *see also* AR 1709 (§ M.3.1).

Under the program management subfactor, offerors were required to demonstrate the ability to efficiently address four separate areas: exercise management, management structure, personnel management, and a program management setup plan. AR 1697–98 (§ L.4.1). For exercise management, offerors were required to submit a Realistic Military Training ("RMT") packet and an After Action Review ("AAR") "from the same exercise." AR 1697 (§ L.4.1.1). The purpose of this requirement was for the Army to evaluate "the Offeror's ability to execute complex pre-exercise coordination and post-exercise activities." AR 1709 (§ M.4.1.1.1). Within management structure, offerors were required to "identify all teaming arrangements, partnerships, joint venture ownership and contingencies, as applicable, within this description." AR 1697 (§ L.4.1.2). The Army evaluated the "soundness and completeness" of the offeror's approach to each of the four areas within the program management subfactor. AR 1709 (§ M.4.1.1).

The crisis response subfactor required offerors to demonstrate their approach to a sample task order ("STO") for supporting a Crisis Response Force ("CRF"), AR 1698 (§ L.4.2), referred to as STO-1. AR 1259. In evaluating an offeror's approach to STO-1, the Army focused on six equally weighted elements: logical structure, command structure replication, scenario, intel, logistics plan, and personnel support. AR 1710 (§ M.4.1.2), 3391.

For the core competencies subfactor, offerors were required to submit an approach for ***92** three different STOs: Unconventional Warfare Exercise ("UWEX"), Special Activities ("SA"), and Next Generation Soldier Tracking System ("NGSTS"), AR 1698–1700 (§§ L.4.2–L.4.3), referred to as STO-2, STO-3, and STO-4, respectively. AR 1259. The Army assessed the offeror's approach to STO-2 and STO-3 with the same six equally weighted elements as STO-1, while STO-4 was evaluated for technical, capability, form, fit, function, and network. AR 1711–12 (§§ M.4.1.2–M.4.1.3), 3396.

The Agency evaluated the program management, crisis response, and core competencies subfactors in descending order of importance. AR 1709 (§ M.3.1). For each of those technical subfactors, offerors were adjectivally rated as "outstanding," "good," "acceptable," "marginal," or "unacceptable." AR 1715 (§ M.5.1). These ratings were based on the aggregate assessment of an offeror's strengths, weaknesses, and deficiencies. AR 1709, 1716 (§§ M.4.1, M.5.4). A rating of less than "acceptable" (*i.e.*, either "marginal" or "unacceptable") for any of the subfactors resulted in an "unacceptable" rating for the overall capability evaluation factor. AR 1709 (§ M.3.1).

2. Past Performance Volume

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The RFP required that proposals contain relevant past performance information to demonstrate an offeror's ability to successfully perform task orders similar to the planned SOF RAPTOR IV task orders. AR 1700 (§ L.5). Each offeror was permitted to submit a maximum of five prior contract references on which it was the prime contractor, as well as an additional four contract references for any subcontractor "that the bidder deems necessary to demonstrate their *team approach* to substantiate this solicitation's requirements." AR 1700 (§ L.5) (emphasis added). Offerors were further required to submit a narrative explanation and a completed past performance questionnaire ("PPQ") for each contract reference. AR 1701 (§§ L.5.2–L.5.3). Past performance was adjectively rated for relevancy ("very relevant," "relevant," "somewhat relevant," and "not relevant") and confidence ("substantial confidence," "satisfactory confidence," "neutral confidence," "limited confidence," and "no confidence"). AR 1715–16 (§§ M.5.2–M.5.3).

3. Cost/Price Volume

The RFP required offerors to submit a total evaluated price ("TEP") and cost workbooks, including proposed labor rates. AR 1702-04 (§ L.6.0). The Army evaluated an offeror's price and cost proposals, respectively, for reasonableness and realism. AR 1713–14 (§ M.4.3). The RFP provided that "[a]s part of this evaluation, the Government may consider DCMA and DCAA audit information and other information the Government deems relevant."[2] AR 1714 (§ M.4.3.4). To determine financial responsibility, the RFP specified that "DCAA *will* ... perform a Financial Capability Risk Assessment for the Prime offeror ... [and t]he Prime offeror *must be deemed financially responsible* by the Contracting Officer *based on* the Financial Capability Risk Assessment." AR 1714 (§ M.4.3.7) (emphasis added).

4. Administrative Volume

The RFP instructed offerors, with regard to contents of the administrative volume, to include, among other things, "all executed teaming arrangements, partnerships, joint venture ownership documentation, associate contractor agreement and contingencies, as applicable." AR 1706 (§ L.7.7). The RFP added that "any previous teaming arrangements ... that [are] referenced within the proposal *shall* be included as attachments in the admin volume *as supporting documentation*." *Id.* (emphasis added) The RFP acknowledged, however, "that companies are not locked into any teaming arrangement or subcontractors for future work under SOF RAPTOR IV." AR 1706 (§ L.7.7.1).

C. The RFP's Evaluation Process

The Agency initially screened proposals to ensure that all offerors submitted the necessary information per the RFP's requirements. AR 1626. Source selection evaluation board ("SSEB") teams were assigned to evaluate ***93** and rate proposals. AR 1627. Specifically, [ZH] supported capability evaluations and [MD] evaluated capability and past performance. AR 1631. Two non-government advisors with subject-matter expertise, [JL] and [GH], assisted government officials with the capability volume evaluations. AR 1622, 1631. The individual evaluators or teams forwarded recommendations to the respective chairperson for each team assigned to an evaluated factor – *i.e.*, capability, past performance, and cost/price. AR 1627, 1631. As relevant for this case, [JS] was the capability factor chairperson. AR 1631. The chairpersons then transmitted their reports to [RM], the overall SSEB Chair. AR 1627, 1631. SSEB Chair [RM] was responsible for preparing a comprehensive and accurate proposal evaluation report ("PER"). The PER contained "the adjectival assessments for each factor and subfactor as well as a Cost/Price report and the supporting rationale." AR 1627. He provided the PER to the source selection advisory council ("SSAC"), which, in turn, provided the source selection authority ("SSA") with a source selection decision recommendation. AR 1628. This source selection team structure and the identities of its members were not made publicly available to any of the offerors. AR 1629.[3]

D. The Contract Awards and GAO Protest History

On December 14, 2018, OGT, a Raleigh, North Carolina-based SDVOSB, timely submitted its proposal. AR 2576. Nine other SDVOSB offerors, including F3EA and Lukos-VATC JV III, LLC ("Lukos"), also submitted timely proposals. AR 3375.[4]

On January 15, 2020, the Army awarded SOF RAPTOR IV to F3EA. AR 70. F3EA was evaluated as the offeror with the highest technical rating and lowest price of the three proposals that received an acceptable (or greater) capability rating. AR 3386–87. The Agency rated F3EA as "outstanding" in each capability subfactor and assigned a "very relevant/substantial confidence" rating for past performance. AR 3386. The Agency rated the capability volumes of the remaining seven

offerors' proposals, including that of OGT, as either marginal or unacceptable, thus rendering their proposals unawardable pursuant to Section M.3.1 of the RFP. *Id.* That same day, the Agency transmitted a letter to OGT, informing it that the Agency decided to award the contract to F3EA. AR 2111–12.

On January 28, 2020, OGT filed a protest with the Government Accountability Office ("GAO"), raising numerous challenges to the Agency's evaluation of OGT's capability and past performance volumes and to the Agency's decision to award a contract to F3EA. AR 6. Among other grounds, OGT alleged that F3EA improperly benefited from unequal access to information and biased ground rules, thus resulting in a prohibited organizational conflict of interest ("OCI"). [5] AR 6–347. In support of those serious allegations, OGT submitted two emails that it received from former F3EA employees. AR 2312, 2386–87. In those emails, the former F3EA employees alleged not only that they overheard conversations between F3EA's [* * *], and a government point of contact named "[RM]" regarding "the intent for F3EA to get the work" but also that [RM] steered the contract award to F3EA by deliberately selecting three STOs for the capability factor evaluation (STO-1, STO-2, and STO-3) that were very similar to certain task orders that F3EA had performed under the predecessor SOF RAPTOR III contract. AR 25–26 (internal quotation marks omitted). [6] ***94** The former F3EA employees also alleged that F3EA had a role in actually drafting the STOs. *Id.* On January 29, 2020, based on the same allegations contained in OGT's GAO protest, OGT sent a notice of possible Procurement Integrity Act ("PIA") violations to the cognizant PCO. AR 854–55.

On January 31, 2020, the Army issued a notice of corrective action, representing to GAO, in relevant part, as follows:

> The Army *will reevaluate proposals* consistent with the solicitation, determine the impact of the reevaluations on the source selection decision, and document its reevaluation and new best value determination. ... Additionally, the Army has initiated an investigation in accordance with FAR 9.505 to determine the validity of the organizational conflict of interest (OCI) allegations in Oak Grove's protest. The Army will also investigate the allegations set forth in Oak Grove's January 29, 2020 Notice of Possible Procurement Integrity Act Violations in accordance with FAR 3.104. The Army will take appropriate action as necessary based on the results of the information gathered during the investigation.

AR 348 (emphasis added). GAO dismissed OGT's protest, finding that the Army's planned corrective action rendered the protest academic. [7] AR 350.

On February 18, 2020, the PCO authored a nine-page memorandum summarizing findings from his investigation of OGT's PIA and OCI allegations. AR 2037–46. As part of that investigation, government procurement officials and support contractors – [GH], [JL], [ZH], [MD] – provided written statements, in which they all categorically denied both having heard SSEB Chair [RM's] discussing influencing the procurement for the benefit of F3EA and having asked them to inflate F3EA's proposal ratings. AR 2041–44. The PCO further conducted in-person interviews with [JS] and [JL]. AR 2042–43. SSEB Chair [RM] also submitted a written statement to the PCO, in which [RM] denied providing any advantage or assistance to F3EA. AR 2044–45. Moreover, [RM] asserted "that any task order that F3EA would have had a role in editing, would have been in the capacity of performance on the [SOF RAPTOR] III efforts[,]" as the incumbent on that contract. *Id.* Based on those written statements and interviews, the PCO concluded that OGT's allegations were not credible and, therefore, that no OCI or PIA violations could be substantiated. AR 2045. The PCO further memorialized these findings in yet another summary memorandum, dated May 1, 2020, in which the PCO critiqued the former F3EA employees' allegations because they "did not provide a timeline of when the statements and discussions occurred, the topics of the discussion and who were other parties that were present." AR 2569–72.

Notably, however, the PCO did not interview the two former F3EA employees who made the allegations, nor did the PCO interview F3EA's [* * *] who, like [RM], was implicated in the allegations. *See* AR 2037–46, 2569–72. The record does not contain any indication that either the PCO or any government official interviewed [RM] regarding the allegations of improper conduct. And, to be clear, neither

memorandum notes or otherwise reveals the significant role that [RM] played in the procurement.

On August 31, 2020, following the Agency's investigation and other putative corrective action, the Army once again awarded the SOF RAPTOR IV contract to F3EA, having concluded that F3EA remained the offeror with the highest technical rating with the lowest price. AR 3343–44. [8] That same day, the Army informed OGT, via a debriefing letter, that "the [PIA] allegations were investigated and found to have no basis to support the allegations." AR 3884–86. On September 9, 2020, OGT filed a second protest with GAO, raising the same issues as the first protest. AR 383–932. On December 18, 2020, ***95** GAO denied the protest. AR 4068–75. GAO concluded that because the Agency reasonably assessed OGT's proposal as technically unacceptable (and thus unawardable), OGT lacked standing to challenge any remaining issues with the evaluation process. AR 4071–72, 4074.

E. Procedural History

On January 21, 2021, OGT filed its complaint against the United States in this Court. ECF No. 1 ("Compl."). That same day, F3EA filed an unopposed motion to intervene, which this Court granted. ECF No. 9, Minute Order (Jan. 21, 2021). In the complaint, OGT alleges that the Agency: (1) inadequately investigated whether [RM] steered the procurement award to F3EA (Count I); (2) awarded F3EA the contract despite the existence of biased ground rule or unequal information OCIs (Count II); (3) violated FAR 1.602-2 and FAR 3.101-1 (Count III); (4) abused its discretion in failing to engage in discussions or clarifications with OGT (Count IV); (5) arbitrarily assessed weaknesses to various sections of OGT's proposal (Counts V–VIII); (6) misevaluated Lukos' proposal (Count IX); and (7) awarded F3EA the contract despite various critical deficiencies with its proposal (Counts X–XII). Compl. at ¶¶ 8–27 (summarizing OGT's complaint counts).

On January 28, 2021, the Court held a status conference with the parties to discuss, among other things, whether OGT intended to seek preliminary injunctive relief. ECF No. 18. On February 1, 2021, the parties filed a joint status report, informing the Court that the Army had "certain exigent special forces training needs" for six task orders that would be awarded to F3EA under SOF RAPTOR IV between February 11, 2021 and May 3, 2021 and that OGT would not seek preliminary injunctive relief to enjoin their performance. ECF No. 19 ("February JSR") at 1–2. The parties further agreed that "no Party shall argue that the awarded task orders prevent the Court from providing complete declaratory and permanent injunctive relief" and that the Court "should make any relief ruling without regard to any cost or disruption from terminating, recompeting, or rewarding the challenged contract." *Id.* at 2–3.

On February 10, 2021, the government filed the administrative record in this matter. ECF No. 23. On February 26, 2021, OGT filed its motion for judgment on the administrative record. ECF No. 27 ("Pl. MJAR"). On March 26, 2021, the government filed its motion to dismiss for lack of standing pursuant to RCFC 12(b)(1) or, in the alternative, a cross-motion for judgment on the administrative record. ECF No. 30 ("Def. MJAR"). That same day, F3EA also filed its cross-motion for judgment on the administrative record. ECF No. 31 ("Intv. MJAR"). The parties filed timely response briefs. ECF Nos. 35 ("Pl. Resp."), 38 ("Def. Reply"), 39 ("Intv. Reply"). On April 5, 2021, OGT filed a motion for leave to amend its complaint to add facts (supporting a challenge to Lukos' technical acceptability) that OGT asserted it learned only following the government's filing of the administrative record. ECF No. 34. While the government did not oppose the motion, F3EA did. ECF No. 40. OGT filed a reply brief in support of its motion for leave to file an amended complaint. ECF No. 42. [9] On May 12, 2021, the Court held oral argument. ECF No. 41.

Following oral argument, the Court directed the government, on May 20, 2021 (ECF No. 43), May 28, 2021 (ECF No. 53), and, again, on June 28, 2021 (ECF No. 63), to file certain documents that, erroneously, had been omitted from the administrative record as originally filed. The government filed corrections to the administrative record on May 25, 2021 (ECF Nos. 47–49), June 1, 2021 (ECF Nos. 55–56), June 4, 2021 (ECF Nos. 59–60), and June 29, 2021 (ECF Nos. 64–66).

***96** On May 25, 2021, OGT requested the Court order temporary injunctive relief regarding three task orders that the Army intended to award to F3EA between May 31, 2021 and June 15, 2021. ECF No. 46. On May 27, 2021, the government filed its response in opposition to the issuance of preliminary injunctive relief "due to the exigencies of the Government's issuing task orders for special forces training under the challenged contract[.]" ECF No. 52. The next day, the Court directed the parties to meet-and-confer to attempt to resolve the preliminary injunctive relief issue. ECF No. 53. On June 2, 2021, the parties filed a joint status report,

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informing the Court that OGT would withdraw its request and that "the Court should treat these three additional task orders (relative to relief) as the parties' [sic] agreed the Court should handle task orders 1–6[.]" ECF No. 58 ("June JSR") at 1–2. The parties further agreed "that should the Court issue permanent injunctive relief ... none of the parties wish to see an abrupt cessation of services under the task orders that have been issued and are being performed ... [and t]herefore, the parties will agree to cooperate to ensure a reasonable period of transition on any pending task orders that are being performed[.]" *Id.* at 2. The government represented to the Court that the Army "does not intend to issue any further task orders prior to July 31, 2021 (at the earliest)." *Id.*

II. JURISDICTION AND STANDING

[1] **[2]** **[3]** The Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870, provides this Court with "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). "An interested party is an actual or prospective bidder whose direct economic interest would be affected by the award of the contract." *Digitalis Educ. Sols., Inc. v. United States*, 664 F.3d 1380, 1384 (Fed. Cir. 2012). To satisfy the "direct economic interest" requirement in a post-award bid protest, a plaintiff "must show that there was a 'substantial chance' it would have received the contract award but for the alleged error in the procurement process." *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003) (quoting *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999)).

OGT was an actual offeror, as it submitted a timely proposal prior to the December 14, 2018 deadline for proposals. AR 2576. OGT alleges that but for the Agency's various errors in conducting the procurement at issue, OGT would have had a substantial chance of receiving an award and that, conversely, both F3EA, the actual awardee, and Lukos, another offeror, were ineligible for a contract award. Pl. MJAR at 14–18. Specifically, OGT argues, among other things, that the Agency credited F3EA's proposal with the capabilities and past performance of a significant team member notwithstanding that F3EA failed to include the required teaming agreement in its proposal and, with regard to Lukos, that the Agency evaluators found that Lukos' cost/price volume of its proposal contained a "significant performance risk" which the Agency appeared to have ignored. *Id.* at 15–17.

The government argues, however, that should the Court conclude that the Agency reasonably found OGT's proposal unacceptable, OGT lacks standing to challenge any other alleged errors in the procurement. Def. MJAR at 31. Moreover, the government and F3EA contend OGT does not have a substantial chance of receiving this contract award because despite all of the allegations regarding the Agency's evaluation of OGT's and F3EA's proposals, Lukos was the next-in-line, awardable offeror. Def. MJAR at 31–33; Intv. MJAR at 37–40.

[4] As "standing is a threshold jurisdictional issue[,]" *Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369–70 (Fed. Cir. 2002), the Court must address the government's motion to dismiss for lack of standing before reaching the merits of this case. *See* ***97** *Media Techs. Licensing, LLC v. Upper Deck Co.*, 334 F.3d 1366, 1370 (Fed. Cir. 2003) ("Because standing is jurisdictional, lack of standing precludes a ruling on the merits.").

[5] **[6]** **[7]** Even when an agency has determined that an offeror is technically unacceptable, that alone does not vitiate an offeror's standing to challenge the results of a procurement pursuant to 28 U.S.C. § 1491(b). Indeed, "[s]uch a position is contrary to established case law and has been rejected both in the Federal Circuit and this Court." *Allied Tech. Grp., Inc. v. United States*, 94 Fed. Cl. 16, 37–38 (2010) (citing *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1307–08 (Fed. Cir. 2006); *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1334 (Fed. Cir. 2001); *Dyonyx, L.P. v. United States*, 83 Fed. Cl. 460, 460 (2008)), *aff'd*, 649 F.3d 1320 (Fed. Cir. 2011). The correct rule is that "[a] bidder has an economic interest and therefore standing to challenge a contract award where, 'if the [offeror's] bid protest were allowed because of an arbitrary and capricious responsibility determination by the contracting officer, the government would be obligated to rebid the contract, and [the bidder] could compete for the contract once again." *Eskridge & Assoc. v. United States*, 955 F.3d 1339, 1345-46 (Fed. Cir. 2020) (quoting *Impresa*, 238 F.3d at 1334); *see Tinton Falls Lodging Realty, LLC v. United States*, 800 F.3d 1353, 1358–59 (Fed. Cir. 2015) (holding that unacceptable offeror has standing "if, as a result of a successful bid protest, the government would be obligated to rebid the contract and the protester could compete for the contract during the reopened

bid"). Furthermore, in cases where there are more than two offerors, a protestor will have standing to allege "that it has a substantial chance of being awarded the contract if its allegations regarding the proposals of offerors who may be next in line for award are potentially meritorious." *Bluewater Mgmt. Grp., LLC v. United States*, 150 Fed. Cl. 588, 608 (2020).

[8] **[9]** Here, even putting aside OGT's allegations of error in the Agency's evaluation of its own proposal, OGT has alleged sufficient facts that, if true, demonstrate the Agency acted in an arbitrary and capricious manner, and otherwise abused its discretion, not only in evaluating F3EA's and Lukos' proposals but also in terms of the investigation that the Agency agreed to undertake as part of its corrective action following OGT's initial GAO protest. Such allegations, if proven, would arguably require the Agency to resolicit the SOF RAPTOR IV contract or engage in discussions because there would be no remaining awardable offeror. To the extent that the government disputes OGT's factual allegations regarding the flaws in Lukos' proposal, *see* Def. MJAR at 32–33, that is a merits question, not a standing issue. That is because "before reaching the merits of the parties' dispute, the court conducts only a 'limited review' of the plaintiff['s] allegations and the administrative record for the 'minimum requisite evidence necessary for plaintiff to demonstrate prejudice and therefore standing.' " *Magnum Opus Techs., Inc. v. United States*, 94 Fed. Cl. 512, 530 n.12 (2010) (quoting *Night Vision Corp. v. United States*, 68 Fed. Cl. 368, 392 & n.23 (2005)). Again, "[a]t this point in the [standing] inquiry, we assume the well-pled allegations of error to be true." *Digitalis Educ. Sols., Inc. v. United States,* 97 Fed. Cl. 89, 94 (2011), *aff'd,* 664 F.3d 1380 (Fed. Cir. 2012). The Court concludes that OGT has pled sufficient facts supporting allegations of procurement errors to establish standing and, therefore, to have its claims decided on the merits.

III. STANDARD OF REVIEW

[10] **[11]** **[12]** Judgment on the administrative record pursuant to RCFC 52.1, "is properly understood as intending to provide for an expedited trial on the record." *Bannum, Inc. v. United States*, 404 F.3d 1346, 1356 (Fed. Cir. 2005). The rule requires the Court "to make factual findings from the record evidence as if it were conducting a trial on the record." *Id.* at 1354. The Court asks whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the record evidence. *Id.* at 1356–57.

[13] **[14]** **[15]** Generally, in an action brought pursuant to § 1491(b) of the Tucker Act, the Court reviews "the agency's actions according to the standards set forth in the Administrative Procedure Act, 5 U.S.C. § 706." *See* ***98** *Nat'l Gov't Servs., Inc. v. United States*, 923 F.3d 977, 981 (Fed. Cir. 2019). Pursuant to that APA standard, the Court asks, "whether the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* (citing 5 U.S.C. § 706(2)). In other words, the Court must "determine whether '(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.' " *Id.* (quoting *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1358 (Fed. Cir. 2009)).

[16] **[17]** **[18]** "When a challenge is brought on the first ground, the test is whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion, and the disappointed bidder bears a heavy burden of showing that the award decision had no rational basis." *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (internal citation marks omitted). "When a challenge is brought on the second ground, the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations." *Impresa*, 238 F.3d at 1333 (internal quotation marks omitted). To establish prejudice in a post-award challenge, a protester must further demonstrate that " 'but for the alleged error, there was a substantial chance that it would receive an award–that it was within the zone of active consideration.' " *Allied Tech. Grp., Inc. v. United States*, 649 F.3d 1320, 1326 (Fed. Cir. 2011) (brackets omitted) (quoting *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996)).

IV. THE GOVERNMENT VIOLATED THIS COURT'S RULES GOVERNING THE FILING OF THE ADMINISTRATIVE RECORD

[19] **[20]** Before proceeding to the merits of this case, the Court is compelled to address the government's mishandling of the administrative record in this case. In a procurement-related action pursuant to 28 U.S.C. § 1491(b), this Court is required to base its APA review of agency action on " 'the full administrative record that was before the [agency decision maker] at the time he made his decision.' " *East West, Inc. v. United States*, 100 Fed. Cl. 53, 56 (2011) (alteration in *East West*) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)); *see Vanguard Recovery Assistance v. United States*, 99 Fed. Cl. 81, 92 (2011) ("[T]o perform an effective

review ... , the court must have a record containing the information upon which the agency relied when it made its decision as well as any documentation revealing the agency's decision-making process."); *cf. Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1276 (D. Co. 2010) ("[t]he proper touchstone remains the decision makers' actual consideration"). "Implementing that idea, this Court's Rules [in RCFC Appendix C, ¶¶ 21–24] provide detailed guidance on what documents typically should be included in the administrative record." *Naval Sys., Inc. v. United States*, 153 Fed. Cl. 166, 178 (2021).

[21] **[22]** However, "[t]he court's review function is undermined when an agency assembles a record that consists solely of materials that insulate portions of its decision from scrutiny or that it deems relevant to specific allegations raised by a protester." *Joint Venture of Comint Sys. Corp. v. United States*, 100 Fed. Cl. 159, 168–69 (2011). Moreover, "[a]llowing a protest to be decided upon an AR which does not reflect what actually transpired would perpetuate error and impede and frustrate effective judicial review." *AshBritt, Inc. v. United States*, 87 Fed. Cl. 344, 366 (2009). Simply put, "an agency does not possess the discretion to make these records whatever it says they are." *East West*, 100 Fed. Cl. at 56.

In the instant case, the government's handling of the administrative record is unacceptable. Two of the central issues in this bid protest are: (1) whether SSEB Chair [RM] acted improperly during the course of this procurement, to the detriment of the integrity of the process, generally, and to OGT, in particular; and (2) whether Lukos was eligible for a contract award, a fact which the government argued – both before GAO and, again, before this Court – should deprive OGT of standing. Compl. at ¶ 23; Def. MJAR at 31–33. As detailed *infra*, notwithstanding the centrality of those two questions to this case, the government omitted several critical ***99** documents from its initial and subsequent administrative record filings, which documents directly and unequivocally undermine the government's position.

For the sake of completeness of this decision, the Court reviews the record issues, both procedurally and substantively, in detail.

On May 20, 2021, following oral argument, the Court ordered the government to complete the administrative record with specified documents and to provide an explanation for why those documents were not included in the Agency's initial administrative record filing. ECF No. 43. The Court identified those omitted documents because the initial administrative record referenced but did not include them. In response, the government filed a corrected administrative record, for the first time including several key documents, including a DCMA financial capability report regarding Lukos' cost/price volume, the administrative volume of Lukos' proposal, and various proposal evaluation reports and source selection documents from the Agency's pre-corrective action evaluations and decision-making. ECF No. 47.

The government repeatedly explained, in its response to the Court's May 20, 2021 order, that the government believed that a number of these documents were "*not considered especially relevant* or necessary to the instant protest." *Id.* at 2 (emphasis added); *see id.* at 3, 4, 6. The government doubled down on the legal grounds for its proffered rationale, explaining:

> As an initial matter, it is our understanding that not all documents are required to be included in the administrative record and certain documents regarding a superseded evaluation were not considered relevant. See Rules for the Court of Federal Claims (RCFC) Appendix C. In addition, Appendix C ¶ 22 lists items that "may ..., as appropriate" be among the "core documents relevant to a protest." It is, therefore, not binding, nor is it exhaustive. *See Allied Tech. Grp., Inc. v. United States*, 92 Fed. Cl. 226, 230–31 (2010) ("Appendix C, ¶ 22(u) employs the words 'may' and 'as appropriate,' leaving it to the Court's reasoned discretion to determine when materials should be added to the administrative record."). With these considerations in mind, we exercised discretion in assembling the AR. To the extent that we omitted certain documents that should have been included, which [sic] apologize.

ECF No. 47 at 1-2.

The government's failures did not end there. On May 28, 2021, following a status conference, during which OGT's counsel noted that other important administrative record documents – F3EA's Appendix B to its capability volume and the entire cost/price volume of its proposal – inexplicably appeared to be missing from the administrative record, the Court directed the government, yet again, to ensure that the filed administrative record was complete. ECF No. 53. Specifically, the Court ordered that "counsel of record for the government shall consult with the cognizant contracting officer to determine whether any other documents relating to the agency's decision-making at issue (*e.g.*, [F3EA]'s proposal, [Lukos'] proposal, and/or [RM's] role

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in the procurement at any stage) were omitted from the administrative record." *Id.* at 2.

In response, the government filed yet *another* corrected version of the administrative record, this time producing the remainder of F3EA's proposal and, *without any explanation for its original omission*, a letter terminating [RM's] role as SSEB Chair. ECF No. 56. That letter, dated April 30, 2020, [10] memorialized as follows:

> This termination is the result of repeated inconsistencies within multiple revisions of the Proposal Evaluation Report (PER), including significant findings being omitted that were documented in the consensus roll up. These omissions resulted in incomplete evaluation review by the Source Selection Advisory Council and (SSAC) and SSA and incomplete evaluation information being provided to the Offerors during the debriefing. As a result of multiple Government Accountability Office protests, the ***100** Procuring Contracting Officer initiated corrective actions to review and amend the PER to ensure that the solicitation criteria was followed. The corrective action was to add the omitted information into the PER, review the findings for compliance and determine if the ratings assessed were still relevant considering the additional information. Each subsequent version of the PER has had significant areas of disagreement between the documented findings and the solicitation requirements or areas where the proposal citations do not support the rating that was assessed. The fact that these areas seem to persist with every new version of the PER has led to the conclusion that appointment of a new SSEB Chairperson is necessary.

AR 5388.

On June 4, 2021, the government produced yet additional administrative records documents that were missing from OGT's cost/price and administrative volumes, relevant evaluation reports, and pre- and post-corrective action communications between OGT and the Agency. ECF Nos. 59–60. Finally, on June 28, 2021, the Court discovered that a certain source selection document that the government purported to have filed was still not in the corrected administrative record; the Court ordered the government to file this document, ECF No. 63, which the government promptly filed the next day. ECF Nos. 64–66.

The government's conduct regarding the administrative record is simply unacceptable and there are a several glaring flaws with its proffered explanations for its conduct.

First, although the government repeatedly attempted to excuse its failure to include in the administrative record particular documents, utilizing a "not especially relevant" standard, counsel for the government was unable to provide any authority to support that standard. Indeed, he immediately abandoned the contention when questioned during a status conference. ECF No. 62 ("May 28, 2021 Status Conference Tr.") at 38:18–39:3 ("I'm not suggesting there's an especially relevant standard, but -- and if I've expressed that awkwardly, I apologize."). The government, however, provided no other explanation for the critical document omissions.

[23] **[24]** *Second*, in compiling the administrative record, the government does not possess a unilateral veto over administrative record documents based on a self-serving conclusion that they are not relevant to the procurement decision under review. Again, the "whole record" consists of "all the material that was developed and considered by the agency in making its decision." *Software Eng'g Servs., Corp. v. United States*, 85 Fed. Cl. 547, 552–53 (2009) (internal quotation marks omitted). Although the government relied upon Appendix C, ¶ 22, of this Court's Rules to justify withholding particular documents from the administrative record, *see* ECF No. 47, that paragraph of this Court's Rules provides no such support. Paragraph 22 of Appendix C simply does not address the scope and contours of an administrative record generally, but rather only identifies a non-exhaustive list "of relevant *core* documents" in order to "expedite final resolution of the case." RCFC App. C, ¶ 22 (emphasis added). The next paragraph, ¶ 23 of Appendix C, makes perfectly clear that the "core documents" are only intended to capture a subset of the complete administrative record; indeed, that

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latter paragraph provides that "the court expects the United States to produce the core documents ***and the remainder of the administrative record*** as promptly as circumstances will permit." *Id.* ¶ 23 (emphasis added); *see also id.* ¶ 24 ("Any additional documents within the administrative record must be produced at such time as ... ordered by the court.").

Third, while the government attempts to excuse its failure to include certain documents in the administrative record on the grounds that they were not germane to the Agency's latest contract award decision (*i.e.*, following corrective action), *see* ECF No. 47, that explanation falls particularly flat. For starters, the Agency included in the originally-filed administrative record documents related to the first contract award decision that formed the predicate for the GAO protest and the Agency's subsequent corrective action, ***101** [11] thus demonstrating that not even the government believes its own test for what should be included (or excluded) from the record.

Moreover, with respect to the DCMA report, in particular, the government's explanation is clearly erroneous, if not frivolous. That document is decisively probative regarding Lukos' eligibility for a contract award. *See infra* Section V.A.2. Given the government's reliance throughout this dispute – both before GAO and this Court – on Lukos' status as a potential awardee, why any information related to that offeror was omitted from the administrative record is inexplicable. Indeed, counsel for the government readily conceded the distinction between documents related to Lukos and those related to other offerors not at issue here. [12] The same is true for the inexplicable omission from the initial record of the letter terminating [RM] from his position as SSEB Chair – particularly given his central role in OGT's allegations of improper conduct. *See infra* Section V.C.

Fourth, although counsel for the government later contended that the Agency's document omissions were merely "an oversight," *see* May 28, 2021 Status Conference Tr. at 56:15–17, that facile explanation does little to mitigate the harm that the government has caused in this case by excluding specific documents that should have been included as part of the record from the outset. As this is a record review case, discovery typically is not available; indeed, the government understandably and routinely opposes discovery in bid protest cases, not to mention requests to supplement the record. *Naval Sys.*, 153 Fed. Cl. at 178. But there is a necessary corollary to those rules: plaintiffs must be entitled to rely upon the government's certification that the filed administrative record is complete. *See* ECF No. 23-1 at 1. Plaintiffs should not have to police the government's filing as if routine discovery rules apply. Indeed, it is not as if in these cases a plaintiff can even engage in discovery to learn what documents exist because, to a great extent, a plaintiff in a § 1491(b) action is at the mercy of the government to file a complete, certified record. That the government later readily offers to complete the record when challenged by a plaintiff (or the Court) does not cure the harm caused by an incomplete record. *See* May 28, 2021 Status Conference Tr. at 61:10–14. The government's waiting for a plaintiff (or the Court) to complain about the contents of an administrative record is not an approach that this Court will condone. [13]

As much as the Court would like to assume good faith, the government admits that it made sentient choices regarding the contents of the administrative record, all of which appear to have favored the Agency. Such apparent gamesmanship wastes judicial resources and undermines trust in both the procurement and disputes processes. [14] Accordingly, the government is ordered to show ***102** cause why Defendant should not be sanctioned for wasting the Court's (and Plaintiff's) time and resources on these administrative record deficiencies.

V. DISCUSSION

OGT contends that the Agency erred in assessing OGT's proposal with numerous deficiencies, arbitrarily determined that F3EA and Lukos submitted awardable proposals, abused its discretion in failing to engage in discussions, and conducted an inadequate investigation of improper conduct by [RM]. Compl. at ¶¶ 8–27; Pl. MJAR at 2–6. Although OGT's complaint raises twelve claims, OGT correctly notes that "the Court need not find that any aspect of the Agency's technical evaluation of [OGT's] proposal was improper to grant judgment in [OGT's] favor." OGT Resp. at 26. Nor does the Court need to resolve every issue that OGT raises regarding F3EA's and Lukos' proposals. This is because the Court concludes that OGT has sufficiently demonstrated that the Agency acted in an arbitrary and capricious manner in several respects, thus providing a basis for ruling for OGT on the merits.

[25] **[26]** **[27]** Pursuant to the APA arbitrary and capricious standard of review, "[w]here, as here, a bid protester challenges the procurement official's decision as lacking a rational basis, we must determine whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion[.]" *AgustaWestland*

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N. Am., Inc. v. United States, 880 F.3d 1326, 1332 (Fed. Cir. 2018) (internal quotation marks omitted); *see Atar S.R.L. v. United States*, 730 F.3d 1320, 1325 (Fed. Cir. 2013) ("Courts look for a reasoned analysis or explanation for an agency's decision as a way to determine whether a particular decision is arbitrary, capricious, or an abuse of discretion." (internal quotation marks and alteration omitted)). "This standard requires that the agency not only have reached a sound decision, but have articulated the reasons for that decision." *In re Sang Su Lee*, 277 F.3d 1338, 1342 (Fed. Cir. 2002). Although agencies "are entitled to exercise discretion upon a broad range of issues confronting them in the procurement process[,]" *Impresa*, 238 F.3d at 1332–33 (internal quotation marks omitted), a court should not "defer to the agency's conclusory or unsupported suppositions." *McDonnell Douglas Corp. v. U.S. Dept. of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004). In that regard, this Court will sustain a bid protest where the protester demonstrates that the agency's decision " 'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.' " *Ala. Aircraft Indus., Inc.-Birmingham v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (alteration in *Ala. Aircraft* omitted) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

A. The Agency Acted Arbitrarily In Finding That F3EA And Lukos Submitted Compliant, Awardable Proposals

1. The Agency Failed To Consider F3EA's Noncompliance With The RFP's "Teaming Arrangement" Provision

[28] OGT asserts that F3EA's proposal was deficient because it did not submit its teaming agreement with [* * *], Compl. at ¶¶ 283–88, and because "[t]he Agency failed to enforce its mandatory teaming requirement when it evaluated F3EA's proposal." Pl. MJAR at 42–43. The Court agrees.

FAR 9.601 defines a "contractor team arrangement" as either:

(1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or

(2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.

The second type of agreement, commonly referred to as a prime/subcontractor "teaming agreement," has been described "as a fundamental business strategy" in which "Government contractors ... combin[e] their ***103** performance capabilities with those of other contractors, thereby enhancing the prospects for being awarded Government contracts." Robert H. Koehler, *Teaming Agreements: The Proverbial "Wolf in Sheep's Clothing,"* 14-6 Briefing Papers 1, 1 (May 2014). Indeed, "[a] benefit can be that the past performance and experience of an intended subcontractor can bolster a prime contractor's competitive position and address gaps in the prime contractor's performance capabilities." Michael W. Mutek, *Close Enough for Government Work: The Economic Utility of Teaming Agreements and the Issue of Enforceability*, 49 Pub. Cont. L.J. 423, 426 (2020) (citation omitted).

[29] Here, the RFP required that "[p]roposals shall be compliant with the full solicitation" and that "offerors are required to comply with all requirements stated herein." AR 1693 (§ L.1.7). With respect to the administrative volume, the RFP instructed that "[o]fferors shall include in full all executed teaming arrangements ... as applicable." AR 1706 (§ L.7.7). The Federal Circuit has emphasized that "a proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and a contract award based on such an unacceptable proposal violates the procurement statutes and regulations." *Allied Tech. Grp.*, 649 F.3d at 1329 (internal quotation marks omitted). "So long as the requirement serves a substantive purpose, it is material." *ManTech Advanced Sys. Int'l, Inc. v. United States*, 141 Fed. Cl. 493, 507 (2019). While the RFP further provided that an incomplete proposal "may" be disqualified "at the sole discretion of the PCO[,]" AR 1695 (§ L.3.1), such discretion must be read in light of the mandate in Section L.1.7 and must be exercised reasonably.

Contrary to the government's and F3EA's view, the requirement for an offeror to provide an executed teaming arrangement is not merely an inconsequential formality, but rather serves a substantive and material purpose – ensuring that prime contractors cannot simply claim the capability and experience of another contractor for the purpose of making the offeror's proposal more competitive, absent some

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concrete evidence that the described team will actually perform an awarded contract. While the RFP noted "that companies are not locked into any teaming arrangement or subcontractors for future work under SOF RAPTOR IV[,]" AR 1706 (§ L.7.7.1), that caveat is a truism insofar as the government cannot compel a proposed team member or subcontractor, with which the government is not in privity, to perform a subcontract. But that fact does not undermine the substantive purpose of the requirement to provide teaming agreements in order for an offeror to claim and obtain credit for another company's capabilities or experience. That the Solicitation confirmed an awardee will have the flexibility to change its manner of performance over time does not substantiate F3EA's argument "that the Agency did not consider teaming arrangements with subcontractors to be of substantial import." Intv. MJAR at 66. The Court finds F3EA's argument unpersuasive.

F3EA further contends that the RFP's instruction for an offeror to submit an executed teaming agreement was not a material requirement, *per se*, because that instruction governs only the contents of the administrative volume which is not evaluated; that is, the requirement is only mentioned in the Section L proposal instructions, but not in the Section M evaluation criteria. Intv. MJAR at 67–68. Alternatively, F3EA argues that "OGT's argument must also fail because nothing in the Capability factor proposal instructions or evaluation criteria required a teaming agreement to be submitted in order to receive credit for contributions of a proposed subcontractor." *Id.* at 68. These attempts to undermine the importance of the RFP's requirement for an offeror to provide such agreements as part of its proposal are unavailing.

First, the Court finds that a requirement to provide teaming agreements as part of a proposal serves to substantiate that the offeror has a bona fide arrangement with another contractor to bring together their capabilities and experience, and, concomitantly, precludes an offeror from claiming the experience of another company with which it has no relationship or no intent to cooperate to perform a particular contract. A teaming ***104** agreement thus plays a similar role to commitment letters for proposed key personnel (often required in other procurements), regarding which GAO has held that "[g]enerally, a requirement for letters of commitment from key personnel constitutes a material solicitation requirement." *IT Objects, LLC*, B-418012, 2020 CPD ¶ 2, 2020 WL 104156, *5 (Jan. 2, 2020); *see Wyle Lab'y, Inc.*, B-412964.3, 2016 CPD ¶ 144, 2016 WL 3124842, *7 (May 27, 2016) (same). Even when an RFP's evaluation criteria in Section M does not explicitly address teaming agreements, an RFP's instruction to provide such agreements serves an important gatekeeping function to prevent an offeror from obtaining unjustifiable credit. *See Sentrillion Corp. v. United States*, 114 Fed. Cl. 557, 568 (2014) (holding that the RFP's requirement for binding teaming agreements "clearly had a rational relationship to the agency's needs" because "[a]n agency rationally may ask to know who will be providing services under a contract"). This, of course, is why the RFP includes such an instruction in the first place. The alternative is to read the RFP instruction entirely out of the solicitation as serving no purpose whatsoever. There is no rule that a Section L instruction cannot serve a substantive purpose; on the contrary, this Court has upheld an agency's decision to reject an offeror's proposal solely for the failure to redact sections of its proposal pursuant to the instructions in the RFP. *See Strategic Bus. Sols., Inc. v. United States*, 129 Fed. Cl. 621, 628–30 (2016), *aff'd*, 711 F. App'x 651 (Fed. Cir. 2018). In *Strategic Business Solutions*, this Court held that "the redaction requirement ... is not a formalistic one ... [i]t served a substantive purpose–promoting the unbiased evaluation of all offerors' proposals." *Id.* at 629. The Court here finds the same to be true of the RFP's teaming agreement requirement. [15]

Second, after the RFP required offerors to submit "all executed teaming arrangements," the RFP added that "any previous teaming arrangements ... *that [are] referenced within the proposal shall be included as attachments in the admin volume as supporting documentation*." AR 1706 (§ L.7.7) (emphasis added). The RFP thus makes abundantly clear that there is a direct connection between other sections of an offeror's proposal – *i.e.*, the capability and past performance volumes – and the need for the Agency to review the teaming arrangements to substantiate the claimed references in those other volumes. [16]

[30] The Court acknowledges that this is not a case where the RFP mandated the automatic exclusion of an offeror's proposal for failure to adhere to this instruction; rather, the RFP cautioned offerors that "[f]ailure of an offeror to provide all requested proposal information may render the offeror's proposal as non-compliant and, as such, the offeror's proposal will not be evaluated, at the sole discretion of the PCO." AR 1695 (§ L.3.1). Notwithstanding that the RFP vested the consequences of non-compliance in the discretion of the PCO, that does not end this Court's inquiry. Consistent with the APA standard of review, the administrative record must support that the Agency identified this flaw in the proposal,

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exercised its discretion to not find the proposal noncompliant (or to waive the flaw), and "present[ed] a full and reasoned explanation of its decision." *In re Sang Su Lee*, 277 F.3d at 1342. An agency's failure to consider the issue or to exercise discretion absent any supporting rationale is, by definition, an abuse of discretion.

***105** F3EA did not submit an executed teaming arrangement with [* * *] in its administrative volume, *see* AR 3598–3608, but [* * *] is referenced throughout F3EA's proposal as a proposed team member. [17] In F3EA's capability volume, for example, F3EA extensively highlighted the advantages to its proposal that [* * *] would provide, as follows:

[* * *]

[* * *]

[* * *]

AR 3069.

This series of paragraphs appears again in F3EA's administrative volume. AR 3602. But, more critically, F3EA *fully relied* on [* * *] as its technical solution in response to [* * *] in the capability volume's core competencies subsection. AR 3137–42 ("F3EA proposes [* * *], *which will be provided by our teammate,* [* * *]." (emphasis added)). Throughout F3EA's narrative, it identified that [* * *] possessed this technology, not F3EA. [18] The Agency assigned three strengths for F3EA's technical approach for the NGSTS requirement, concluding that it "[e]xceeds specified performance requirements." AR 3400. This in no small part contributed to F3EA's rating of "outstanding" for its core competencies evaluation subfactor. *See* AR 3353 ("[* * *]").

Furthermore, F3EA claimed past performance credit for [* * *] contracts for which [* * *] served as the prime contractor. AR 3249–50. The Agency did not evaluate [* * *] of those submissions because it was a classified contract but the Agency *did* rate the other [* * *] submissions – finding one "very relevant" and the other "relevant" to SOF, generally, but not relevant to the STOs, in particular. AR 3358. The Agency rated F3EA with a "very relevant/substantial confidence" past performance rating because "[t]he Prime Contractor, *as well as the Offeror's one major [proposed] subcontractor*, has a strong organic capability to successfully perform [* * *] with a high degree of confidence. The contributions of the [* * *] subcontractor bring a legitimate [* * *] capability to the team with an existing, proven solution very similar to the [* * *] requirements in [* * *]." AR 3358.

In sum, F3EA's proposed collaboration with [* * *] contributed to the Agency's favorable rating of F3EA's proposal under an RFP where capability and past performance were the most important factors and a sub-acceptable rating on any element of the capability volume would have led to the proposal being rejected. AR 1709. Nowhere in the administrative record does it appear that the Agency identified the issue of F3EA's failure to comply with the RFP's teaming arrangement instruction; nor did the Agency provide a reason for letting F3EA claim credit for [* * *]'s capabilities and experience without requiring supporting documentation consistent with that instruction. Having determined that the Agency failed to exercise its discretion to waive non-compliance with the teaming arrangement provision, the Court cannot conclude that the Agency acted reasonably under the facts of this case. [19]

The prejudice is clear. F3EA's proposal failed to comply with a material Section L ***106** instruction that had profound implications for its evaluation under Section M. Whether that means that F3EA's proposal should have been disqualified *per se* for submitting a noncompliant proposal, or whether that means its evaluation was fatally flawed because F3EA could not obtain any type of credit for its proposed team member and putative subcontractor – either way – the Court cannot conclude that F3EA's proposal was awardable. To the extent the Agency reached a different conclusion, its decision is not justified on this record because the Agency never considered F3EA's compliance failures.

2. The Agency Failed To Comply With The RFP's Requirement To Evaluate The Financial Responsibility Of Lukos' Proposal

[31] In OGT's original complaint**,** OGT asserted that Lukos is not an awardable offeror – and thus cannot serve to deprive OGT of standing – because "the Agency failed to perform a meaningful price reasonableness evaluation." Compl. at ¶¶ 486–91. Following the government's filing of the administrative record, in which additional facts concerning Lukos' proposal came to light, OGT amended its complaint to include, among other things, allegations that the Agency, in finding Lukos potentially awardable, failed to account for "numerous inconsistencies" in Lukos' cost/price volume. ECF No. 34-1 at ¶¶ 487–507; Pl. MJAR at 16–18.

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This Court finds that the administrative record conclusively demonstrates that Lukos, in fact, was ineligible for a contract award.

The RFP required offerors to submit a cost/price volume that would be evaluated, respectively, for reasonableness and realism. AR 1713–14 (§ M.4.3). The RFP provided that "[a]s part of this evaluation, the Government may consider DCMA and DCAA audit information and other information the Government deems relevant." AR 1714 (§ M.4.3.4). Before concluding that an offeror was financial responsible, however, the RFP explained that the Agency would request "DCAA ... to perform a Financial Capability Risk Assessment for the Prime offeror ... [and t]he Prime offeror *must be deemed financially responsible* by the Contracting Officer based on the Financial Capability Risk Assessment." AR 1714 (§ M.4.3.7) (emphasis added).

In the Source Selection Decision Document (August 28, 2020), the SSA noted, as follows:

> Price Analysis - It should be noted that [Lukos] [* * *].
>
> AR 3368. Furthermore, the Consolidated Prenegotiation Objective Memorandum ("POM")/Price Negotiation Memorandum ("PNM") noted that while DCAA issued a Preaward Accounting System report for all offerors and determined that "[a]ll accounting systems were found to be acceptable for award[,]" a separate financial capability assessment was conducted, which determined that:
>
> a. Offerors [* * *] were found to be financially capable of performing the contract, with moderate risk on a scale of Low-Moderate-High.
>
> b. *Offerors [* * *], and [Lukos], were found to be* ***NOT financially capable*** *of performing the contract, with high risk on a scale of Low-Moderate-High*.

AR 3423 (emphasis added).

The government originally contended that "[t]he evaluators did not ignore anything." Def. MJAR at 33 (internal quotation marks omitted). Rather, "[t]he evaluators considered both the technical team's evaluation of the capabilities factor and subfactors ... as well as the cost evaluation ... taking note of the cost evaluators' assessment of performance risk – – and stated their findings in the report." *Id.*; *see also* Def. Reply at 15–16. Even with just these initial findings, the Court struggles to understand how the Agency evaluators properly considered these adverse financial evaluations and still deemed Lukos awardable.

But, as the saying goes: wait, there's more. Although not included in the government's original administrative record filing, the Court, in its May 20, 2021 order, *see* ECF No. 43, directed the government to file the underlying audit reports referenced in the POM/PNM. The government complied with this order. ECF No. 47. In reviewing these documents, the Court was surprised to discover that DCMA in fact had explicitly recommended ***107** "***No Award***" for Lukos. AR 4994 (emphasis added). DCMA explained its recommendation:

> As a result of our analysis, *we do not find [Lukos] to be financially capable* of supporting ... [the Solicitation]. ... [* * *] *Our recommendation for NO AWARD was made after analysis of all information available to us for this formal Pre-award Financial Capability Survey*.

AR 4996 (emphasis added). This document clearly demonstrates that Lukos was found to be not financial capable and thus was not awardable consistent with the RFP's requirements. *See* AR 1714 (§ M.4.3.7). Nowhere does the record demonstrate that the Agency even considered this DCMA finding (assuming for the sake of argument that the contacting officer were permitted to depart from it). In sum, the government's contention that Lukos is an offeror capable of being awarded the contract – thus depriving OGT of standing – violates the RFP or, at a minimum, "runs counter to the evidence before the agency" and constitutes the very height of arbitrary and capricious decision-making. *Ala. Aircraft Indus.*, 586 F.3d at 1375.

Following the exceedingly late disclosure of this document, the government changed its tune, arguing that the "no award" finding does not really mean "no award." ECF No. 47. Specifically, in the government's response to the Court's May 20, 2020 order, the government provided an extensive *post hoc* rationalization from the cognizant PCO:

> Since this was an unpopulated Joint Venture, Lukos VATC provided a guarantor who would support the offeror financially if necessary. That guarantor was found to not

> have sufficient resources to finance a contract of this size, which is not surprising.
>
> If Lukos VATC would have been the awardee for this procurement, the Government would have several paths to award to Lukos VATC in the face of the no-award determination identified in the report.

Id. at 4–5 (discussing at length how the Agency might have been able to award a contract to Lukos despite the DCMA's finding).

[32] **[33]** Again, even assuming the RFP's terms provided the contracting officer with some discretion to depart from the Financial Capability Risk Assessment when grounded in reasonable decision making, the Court declines to credit the PCO's naked assertions made in the heat of litigation particularly because " '[a]ny *post hoc* rationales an agency provides for its decision are not to be considered.' " *CRAssociates, Inc. v. United States*, 95 Fed. Cl. 357, 376 (2010) (quoting *Gen. Elec. Co. v. Dept. of Air Force*, 648 F. Supp. 2d 95, 100 (D.D.C. 2009)). Rather, "'[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its actions are based.' " *Applied Bus. Mgmt. Sols., Inc. LLC v. United States*, 117 Fed. Cl. 589, 604 (2014) (quoting *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1377 (Fed. Cir. 2012)). "*Post hoc* rationales should not form the basis of agency decision-making." *Savantage Financial Servs., Inc. v. United States*, 150 Fed. Cl. 307, 327 (2020). Contrary to the government's characterization, this statement from the cognizant PCO was *not* an explanation regarding "why this document was not earlier provided[,]" ECF No. 47 at 4–6 – which is what the Court ordered the government to address – but rather was nothing more than a *post hoc* argument regarding why the Court should disregard the DCMA's finding.

This Court will not permit the government to withhold highly relevant documents and then – when those documents ultimately come to light and the Agency is confronted with them – allow the Agency to submit unsupported assertions in what is essentially an unsworn declaration from the PCO included in the government's brief in order to cure a defect not only in the government's procurement but in its handling of the administrative record.[20] The Court rejects as preposterous the government's entire approach – both substantive and procedural – to this issue.

***108** Given that both F3EA's and Lukos' respective proposals – and their evaluations – suffer from serious compliance defects under the RFP's terms, OGT has succeeded on the merits of its complaint.

B. The Government Should Have Conducted Discussions

[34] OGT asserts that the Agency's decision not to engage in discussions violated DFARS 215.306 or was otherwise arbitrary and capricious. Compl. at 68–70. The Court agrees.

FAR 15.306(d) delineates the rules for "[e]xchanges with offerors after establishment of the competitive range." In that regard, "[t]he hallmark of such exchanges, called 'discussions,' is that they 'are undertaken with the intent of allowing the offeror to revise its proposal.' " *CliniComp Int'l, Inc. v. United States*, 117 Fed. Cl. 722, 744 (2014) (quoting FAR 15.306(d)); *see also Info. Tech.*, 316 F.3d at 1322 (noting that FAR 15.306 "contemplates discussions as occurring in the context of negotiations" during which "bidders have the opportunity to revise their proposals" (citing FAR 15.306(d))).

[35] **[36]** The Federal Circuit has explained that "[u]nder [FAR] section 15.306(d)(3), whether discussions should be conducted lies within the discretion of the contracting officer." *JWK Int'l Corp. v. United States*, 279 F.3d 985, 988 (Fed. Cir. 2002) (citing FAR 15.306(d)(3)). In this case, the Solicitation included a provision noting that the Agency reserved the discretion to award a contract without engaging in discussions. AR 1708. While "[t]he general rule is that once offerors are warned that the agency intends to award without discussions, absent special circumstances, the contracting officer has the discretion to award without discussions[,]" *Chenega Healthcare Servs., LLC v. United States*, 138 Fed. Cl. 644, 653 (2018), that does not mean that such discretion is plenary. *Day & Zimmermann Servs., a Div. of Day & Zimmermann, Inc. v. United States*, 38 Fed. Cl. 591, 604 (1997)).[21] Indeed, wherever a regulation provides the government with discretion to take (or not to take) an action, such discretion must be exercised reasonably and not in arbitrary and capricious manner. *Essex Electro Eng'rs, Inc. v. United States*, 458 F. App'x 903 (Fed. Cir. 2011) (per curiam) ("When a solicitation states that formal discussions are not required, there may be some circumstances in which the government's failure to hold discussions would be arbitrary and capricious.").

In this case, the picture is further complicated by DFARS 215.306, which provides that "[f]or acquisitions with an estimated value of $100 million or more, contracting officers *should* conduct discussions." DFARS 215.306(c)(1) (emphasis added). Without resorting to case law, the DFARS provision's plain language suggests that an agency must justify *not* engaging in discussions where the provision applies. FAR 2.101 (defining "should" as "an expected course of action or policy that is to be followed unless inappropriate for a particular circumstance"). Put differently, the DFARS provision's plain language would seem to create a presumption in favor of an agency's conducting discussions. The Federal Circuit's decision in *Dell Federal Systems, L.P. v. United States* removes any doubt that DFARS 215.306 generally requires an Agency to engage in discussions. *Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982 (Fed. Cir. 2018).

In *Dell Federal Systems*, unsuccessful offerors filed GAO protests, arguing, amongst other things, "that the Army should have engaged in discussions with offerors ... as required by [DFARS] 215.306(c)[.]" 906 F.3d at 987-88 (footnoted omitted). As part of the agency's corrective action to resolve the protests, ***109** the agency decided it would reopen the procurement to conduct discussions, request new final proposals, and then issue a new award decision. The cognizant contracting officer explained "that because the procurement was valued in excess of $100 million, the Army was likely required to [but did not] conduct discussions with offerors pursuant to DFARS 215.306(c)(1)." *Id.* at 988. Two of the initial awardees filed suit in this Court, seeking to enjoin the corrective action. *Id.* at 989. On appeal, the Federal Circuit upheld the agency's corrective action, holding that, pursuant to DFARS 215.306, "discussions normally are to take place in these types of acquisitions." *Id.* at 995-96. Thus, the Federal Circuit "determine[d] that the corrective action of conducting discussions is rationally related to the *undisputed procurement defect of originally failing to conduct pre-award discussions*...." *Id.* (emphasis added).[22] Indeed, the government plainly confessed the procurement error before the Federal Circuit, arguing that "[u]nless the Army conducts the discussions required by DFARS 215.306 under the facts of this case, the awards will be the result of a flawed procurement process." Reply Brief of Defendant-Appellant United States, *Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982 (Fed. Cir. 2018) (Nos. 17-2535, 17-2554), 2018 WL 790985, at *13; *see id.* at *19 ("The regulatory expectation in this procurement was that the Army would conduct discussions and the record shows that the agency had no reason not to do so.").

Accordingly, the Court in this case asks whether the Agency has sufficiently justified its decision not to engage in discussions.[23] The Agency's analysis – at least as contained in the administrative record, as filed – falls woefully short. The only germane discussion in the record the Court could locate is contained in a single paragraph in the POM/PNM. *See* AR 3424 (Section VII, ¶ 1 ("Award without discussions")). That paragraph, however, nowhere explains why discussions would be inappropriate in the circumstances of this procurement, but rather merely repeats, with different wording, the best value analysis undergirding the selection of F3EA, generally. *Compare id. with* AR 3424 (Section VII, ¶ 2 ("Source Selection Decision")). Moreover, the POM/PNM references a recommendation from the "Source Selection Advisory Council (SSAC)" that "F3EA Inc. be awarded the SOF RAPTOR IV contract without discussions[,]" AR 3424, but the Court could locate no further analysis on the subject in the administrative record, and the government cites to none.

A briefing from the SSEB to the SSAC notes that "[t]he PCO determined that it is in the Government's best interest to award without discussions[,]" AR 4941, but that conclusory statement is plainly insufficient to satisfy DFARS 215.306. Indeed, while the SSEB briefing cites putative regulatory and statutory authorities for the proposition "that award can be made on the basis of proposals received 'without discussions[,]' " the briefing critically omits any mention of, and consequently fails to deal with the requirements of, DFARS 215.306. AR 4941 (citing FAR 15.306(a)(3), 10 U.S.C. § 2305(b)(4)(A)(ii), and 41 U.S.C. § 3703(a)(2)). Even more troubling still, the SSAC Memorandum for Record, dated December 9, 2019 – provided to the Court for the first time pursuant to the ***110** Court's May 20, 2021 order – does not even mention the discussions issue, despite the POM/PNM's apparent reliance on that Memorandum. *See* AR 4966. Finally, to make matters worse, the POM/PNM is inexplicably dated October 2018 in a footer across the bottom of each page of that document, while the SSEB briefing is dated October 2019, further begging the question of precisely when – and on what basis – the Agency decided not to conduct discussions.

Although the SSEB briefing document relies upon FAR 15.306(a) – which covers "[c]larifications and award without discussions" – DFARS 215.306 quite clearly takes precedence in acquisitions exceeding $100 million. 906 F.3d at 995-96. If anything, then, the Agency got the proper framework completely backwards because the DFARS provision makes conducting discussions the default absent a justification to the contrary. *Id.* The Source Selection Plan

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("SSP") confirms the Court's suspicion that the Agency improperly reversed the regulatory presumptions. The SSP directs that "[i]f the solicitation states the Government intends to award without discussions and it is later determined that discussions are necessary, review and approve the PCO's written rationale (see FAR 15.306(a)(3))." AR 1619. But the default rule in acquisitions exceeding $100 million favors discussions. The required rationale, therefore, is not to justify why "discussions are necessary" but rather why they are unwarranted. The SSP reversed that analysis. While the Agency acknowledged that "[f]or acquisitions with an estimated value of $100 million or more, per DFARS 215.306(c)(1), contracting officers *should* conduct discussions[,]" the Agency apparently concluded, incorrectly, that FAR 15.306(a) takes precedence. AR 1620 (emphasis added) (noting that "[i]f the solicitation states the Government intends to award without discussions, determine *whether discussions are necessary* after reviewing proposal evaluation results" and that "[i]f discussions are determined to be necessary, document the rationale and submit it to the SSA for review and approval" (emphasis added)).

In sum, none of the aforementioned documents in the administrative record reflect that the Agency ever considered during the procurement the requirement of DFARS 215.306 that "discussions normally are to take place in these types of acquisitions." 906 F.3d at 995-96. If anything, the Agency incorrectly presumed that the default position favored not conducting discussions. Given the facts of this procurement – *i.e.*, where all offerors or nearly all offerors submitted non-compliant proposals – the Agency should have conducted discussions. [24]

The government argues, however, that the Solicitation put the "offerors squarely on notice of the Government's intent to award the contract without discussions but reserved the right to do so in the 'sole discretion' of the contracting officer." Def. MJAR at 56 (citing AR 1706, 1708). The government is correct that "[t]he solicitation did not reference DFARS [ ]215.306, either expressly, or by incorporation[,]" Def. MJAR at 57, but the DFARS provision is a binding regulatory requirement, not a solicitation provision or contract clause that needs to be (or even should be) incorporated in an RFP. Thus, the government's assertion that the DFARS provision "was not included in the solicitation" is inapposite. *Id.*

Moreover, contrary to the government's arguments, the *Blue & Gold* waiver rule [25] ***111** presents no obstacle to OGT's claim because the Federal Circuit implicitly concluded that there is no inherent contradiction between the DFARS provision and solicitation language cautioning that an agency may not conduct discussions. The government knows this to be the case because it took the opposite position in *Dell Federal Systems* of the one it takes here. The solicitation at issue in that case similarly provided that the Army "intend[ed] to award without conducting discussions with Offerors" and that "the Government reserve[d] the right to conduct discussions and to permit Offerors to revise proposals if determined necessary by the Contracting Officer." *Dell Fed. Sys., L.P. v. United States,* 133 Fed. Cl. 92, 98 (2017) (alteration in original) (administrative record citations omitted). While Dell contended that, in light of such solicitation language, the government erred in taking corrective action to conduct discussions in compliance with DFARS 215.306, the government, at great length, urged this Court conclude that DFARS 215.306 must be followed and that the solicitation language posed no conflict:

> [Dell] asserts that "[t]he Army overrode the DFARS' preference [for discussions] when it clearly communicated to offerors, through the [solicitation's] plain language, its contrary preference *not* to conduct discussions." Dell Cross-MJAR at 13 (emphasis original); *see also* GovSmart Inc. Cross-MJAR at 11-13 (same). This circular argument ignores the requirement that there be a reasonable basis underlying the Army's decision not to conduct discussions. As an initial matter, Dell's assertion that the Army made its final decision to forego discussions at the time of the solicitation is not accurate. While the solicitation stated a preference for not conducting discussions, it clearly left that possibility open. ... The record therefore reflects that the Army's final decision to forego discussions was made well after the solicitation was published. In any event, simply expressing a preference for not following an expected course of action does not, in and of itself, foreclose inquiries into whether a

> reasonable basis exists upon which that preference rests. If that were the case, then an agency could forego taking any expected course of action just by stating that it did not want to, and without having to ever justify that decision. The important point is that, while DFARS 215.306 does not eliminate the agency's discretion to forego discussions, it remains that there must be a reasonable basis for the exercise of that discretion.

Redacted Resp. and Reply Brief of Defendant United States, *Dell Fed. Sys., L.P. v. United States*, 133 Fed. Cl. 92 (2017) (Nos. 17-465, 17-473), at *4-*5 (internal citations omitted).

Moreover, the government in *Dell Federal Systems* took the position that *Blue & Gold* was inapplicable (and not merely because the government's decision to engage in discussions pursuant to DFARS 215.306 was part of corrective action):

> In any event, plaintiffs and plaintiff-intervenors insistence that GAO would have dismissed the protests on timeliness grounds is belied by the administrative record. As we discussed above, although the Army announced an intent to award without discussions, the solicitation clearly left the possibility open. ...While the solicitation announced an intent to forego discussions, the Army was required to act consistently with DFARS 215.306 and only do so [*i.e.,* forgo discussions] if a reasonable basis existed. *Unsuccessful offerors would likely be able to challenge the Army's final decision – made after the close of the solicitation – to make award decisions without discussions*.

Id. at *9 (emphasis added). The government's sudden change of heart due to the exigencies of this case is not persuasive.

On the merits, the Court further rejects the government's argument that the DFARS provision at issue is nothing more than an unenforceable "recommendation" and somehow "is not mandatory[.]" Def. MJAR at 57. This position is simply untenable in light of the government's having persuaded the Federal Circuit to adopt the opposite view in *Dell Federal Systems*, 906 F.3d at 996 (finding "undisputed procurement defect of originally failing to conduct pre-award discussions, as reasonably interpreted by the agency to be ***112** required by the applicable regulations, in the first instance").

F3EA advances a more creative argument, contending that *Blue & Gold* bars OGT's protest ground regarding DFARS 215.306 because the government failed to include in the solicitation the correct FAR provision: FAR 52.215-1 Alternate I. *See* Intv. MJAR at 34-36 & n.25. According to F3EA, the proper way for agencies to implement DFARS 215.306 is to follow DFARS 215.209, which provides that "[f]or source selections when the procurement is $100 million or more, contracting officers should use the provision at FAR 52.215-1, Instructions to Offerors—Competitive Acquisition, with its Alternate I." DFARS 215.209(a). In that regard, pursuant to the Defense Department's Final Rule implementing DFARS 215.306 and DFARS 215.209, "[u]se of the [FAR 52.215-1] clause without Alternate I will not accomplish the stated objectives; only the clause with its Alternate I will accomplish the purpose of this case." Defense Federal Acquisition Regulations Supplement; Discussions Prior to Contract Award (DFARS Case 2010-D013), 76 Fed. Reg. 58150-01, 58152 (Sept. 20, 2011). Thus, F3EA's argument is that because "the solicitation includes *standard* FAR 52.215-1 (*without* Alternate I), the solicitation reflects on its face that the agency has exercised its discretion *not* to implement the policy in DFARS 215.306(c)(1) to the procurement." Intv. MJAR at 34 (emphasis in original) (citing *Blue & Gold*, 492 F.3d at 1313, and arguing that "[a] party who fails to object to the terms of a solicitation prior to the date for proposal submissions waives its ability to raise the objection later in a bid protest").

F3EA's point is not without merit, but, on balance, the Court concludes that F3EA's reading is in unacceptable tension with the Federal Circuit's decision in *Dell Federal Systems*. F3EA argues at length (albeit in a footnote) that *this Court* "did not decide the meaning of DFARS 215.306 but rather just that the agency's interpretation of said regulation to justify corrective action was not completely irrational." Intv. MJAR at 36 n.25 (citing 133 Fed. Cl. at 103–4). The problem, of course, is that *Dell Federal Systems* addressed

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solicitation language substantially identical to that at issue here. Indeed, in that case, "the RFP incorporated FAR 52.212-1(g), which established an expectation that the Army would award contracts without discussions: 'In accordance with FAR 52.212-1 ... the Government intends to award without conducting discussions with Offerors.' " Redacted Cross-MJAR of Plaintiff Dell Federal Systems, L.P., *Dell Fed. Sys., L.P. v. United States*, 133 Fed. Cl. 92 (2017) (Nos. 17-465, 17-473), at *5; *id.* at *13 ("The Army overrode the DFARS' preference when it clearly communicated to offerors, through the RFP's plain language, its contrary preference not to conduct discussions.").

Accordingly, what is clear to this Court is that F3EA makes the very same argument *the Federal Circuit* itself implicitly rejected in *Dell Federal Systems*. *Compare* Intv. MJAR at 35 ("[T]he RFP here conflicted on its face with an intent to conduct discussions pursuant to the policy at DFARS 215.306(c).... The RFP reflected that the preference for discussions in DFARS 215.306(c) was not being applied in this procurement.") *with Dell Fed. Sys.*, 906 F.3d at 996 ("We determine that the corrective action of conducting discussions is rationally related to the *undisputed procurement defect of originally failing to conduct pre-award discussions*, as reasonably interpreted by the agency *to be required by the applicable regulations*, in the first instance." (emphasis added)). F3EA does not adequately address the Federal Circuit's holding, beyond attempting to distinguish it on the grounds that the case involved corrective action. But the Federal Circuit affirmatively agreed with the agency's conclusion in *Dell Federal* that the failure to conduct discussions was an "undisputed procurement defect." 906 F.3d at 996; *see also id.* at 995 (quoting *Alfa Laval*, 175 F.3d at 1368, for the proposition that "an agency is bound by the 'applicable procurement statutes and regulations' " – referring to DFARS 215.306(c)(1)).

Finally, F3EA overreads the explanatory language in the Defense Department's issuance of the Final Rule. ***113** Defense Federal Acquisition Regulations Supplement; Discussions Prior to Contract Award (DFARS Case 2010-D013), 76 Fed. Reg. 58150-01, 58151 (Sept. 20, 2011). In that regard, F3EA's reliance on the following language from the Final Rule is from the section addressing the Defense Department's compliance with the "Regulatory Flexibility Act":

> *There are no practical alternatives that will accomplish the objectives of the proposed rule.* When a solicitation includes the provision at FAR 52.215-1, Instructions to Offerors—Competitive Acquisitions, paragraph (f)(4) of the clause states that the "Government intends to evaluate proposals and award a contract without discussions." If, however, the solicitation includes FAR 52.215-1 with its Alternate I, then the revised paragraph (f)(4) states that the "Government intends to evaluate proposals and award a contract after conducting discussions with offerors whose proposals have been determined to be within the competitive range." Use of the clause without Alternate I will not accomplish the stated objectives; only the clause with its Alternate I will accomplish the purpose of this case.

Discussions Prior to Contract Award, 76 Fed. Reg. at 58151-52 (emphasis added). That language does not add the gloss to DFARS 215.306 that F3EA attributes to it. All that Federal Register language explains is that the standard FAR 52.215-1 reserves flexibility to an agency to award without discussions, while the referenced Alternate version prefers discussions, just as the DFARS provision requires. Quite obviously, a solicitation provision that explicitly prefers discussions necessarily better effectuates the regulatory preference for discussions embodied in DFARS 215.306. But that does not demonstrate the converse – *i.e.*, that a solicitation that permits award without discussions is patently inconsistent with the DFARS provision. Indeed, in the Final Rule issuance itself, the Defense Department concluded that "[t]he rule does not duplicate, overlap, or conflict with any other Federal rules." Discussions Prior to Contract Award, 76 Fed. Reg. at 58151-52.

Moreover, the Court simply cannot attribute significant weight to the section of the Federal Register entry addressing the "Regulatory Flexibility Act," particularly given that the purpose of that section is not to provide an authoritative interpretation of the Final Rule itself, and, more importantly, because the Court cannot begin to understand the precise point the Defense Department was trying to make if F3EA's view is correct. In that regard, the Defense Department's assertion that "[t]here are no practical alternatives that will accomplish the objectives of the proposed rule" is fundamentally inconsistent with F3EA's reading, to the extent that F3EA contends that Alternative I of FAR 52.215-1 would do just that. Put differently, according to the F3EA's view of the Final Rule, DFARS 215.209 would accomplish the desired result for acquisitions exceeding $100 million, and thus DFARS 215.306 would be rendered superfluous. This, the Court will not do. *Baude v. United States*, 955 F.3d 1290, 1305 (Fed. Cir. 2020) ("The government's interpretation of the regulation 'is thus at odds with one of the most basic interpretative canons:' that a statute or regulation 'should

be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ....' " (quoting *Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009))). Particularly in light of the Federal Circuit's decision in *Dell Federal Systems*, the Court cannot conclude that OGT's argument is untimely.

Finally, F3EA's view is refuted by the SSP, in which the Agency acknowledged, generally, the applicability of DFARS 215.306. AR 1620. If F3EA were correct, however, the SSP would have noted that the Agency was making an election not to follow the DFARS provision. In short, the Agency itself did not believe that the ordinary FAR 52.215-1 clause is patently inconsistent with DFARS 215.306. *Id.*

Where, as here, the Agency declined to conduct discussions without considering DFARS 215.306 – and given that regulation's strong preference for discussions in a procurement of this magnitude – OGT successfully has demonstrated success on the merits of its claim. Discussions, of course, would have enabled OGT (and presumably all of the offerors) to fully revise their respective proposals ***114** to address any deficiencies in a final proposal revision.

C. The Agency Failed To Sufficiently Investigate Allegations Of A Procurement Official's Improper Conduct

[37] OGT argues that the Agency insufficiently investigated OGT's allegations that [RM] improperly influenced the procurement in favor of F3EA. Compl. at 60–67. OGT contends that the administrative record supports a finding of PIA violations, *see* 41 U.S.C. ch. 21, [26] the existence of OCIs (biased ground rules and unequal access to information), *see* FAR subpart 9.5, and violations of FAR 1.602–2 and FAR 3.101-1. Pl. MJAR at 18–40. The government counters that none of these provisions apply to the case at hand and that, in any event, OGT "fails to overcome the 'strong' presumption that the contracting officer investigated its OCI allegations and found them to be without merit." Def. MJAR at 58–70 (quoting *Glenn Def. Marine (Asia), PTE Ltd. v. United States*, 105 Fed. Cl. 541, 568–69 (2012), *aff'd*, 720 F.3d 901 (Fed. Cir. 2013)). While the Court agrees with the government that neither the allegations nor the record in this case support a PIA or OCI violation, the Court agrees with the OGT that the Agency did not adequately investigate possible violations of FAR 1.602-2 and FAR 3.101-1, including serious questions of bias or improper conduct impacting the fairness and integrity of this procurement.

The basis for all of the aforementioned allegations are emails from two former F3EA employees, [TI] and [RS], that OGT provided to GAO and the Agency. AR 25–26, 854–55. Those emails disclosed as follows:

> The three Task Orders I was referring to are the Crisis Response Force Exercise (CRF-Ex), Unconventional Warfare (UW), and Sensitive Activities (SA). The language in each was almost verbatim from the previously executed TOs under SR III wherein [* * *] wrote the SOW for the supported unit to ensure it include the verbiage he intended to be a part of the SR IV solicitation. As for the Soldier Tracking System (STS) TO, I just spoke to a friend and former F3EA employee that confirmed he wrote at least some of the language that appeared in that STO for the solicitation. He was also present for several conversations between [* * *] and [RM], during which the intent for F3EA to 'get the work' and other points of supporting a supporting information exchange were discussed.
>
> * * * *
>
> During my employment at F3EA, I participated in a series of conference calls that contained references to F3EA being the vendor of choice for [RM] and during these calls it was made clear that some degree of assistance would be given to F3EA in order to weigh the SOF Raptor competition in F3EAs favor. I was also privy to a series of comments made by F3EA leadership in front of other employees and potential SOF Raptor Teammates that [RM] and other USG rep's would make sure that F3EA had a strong advantage. These advantages came in the form F3EA being able to write the SME position descriptions and qualifications for STOs1-3. Myself and atleast [sic] 3 other employees participated in writing these requirements and immediately recognized the verbiage and terminology used in the SOF Raptor solicitation. [* * *]. It was also assumed that only only [sic] F3EA would be able to provide historic AARs and RMTs (that supported STOs 1-3) that would support the solicitation requirement and that these documents would be used to further deter competition. [* * *].

AR 2312, 2386–87.

The PIA statute, codified at 41 U.S.C. §§ 2101–2107, prohibits federal government officials from "knowingly

disclos[ing] contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract on which the information relates." 41 U.S.C. § 2102(a)(1). FAR 9.505 prohibits offerors from "prepar[ing] ... a work statement to be used in competitively acquiring a system" and instructs offerors to avoid access to information ***115** that that "is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract."

To the extent that F3EA was involved in crafting task orders for SOF RAPTOR III, on which it was an incumbent contractor, and even if those task orders were selected as STOs for SOF RAPTOR IV for the benefit of F3EA, OGT fails to sufficiently allege that [RM] disclosed "contractor bid or proposal information" or "source selection information" from the present SOF RAPTOR IV procurement as prohibited by 41 U.S.C. § 2102.

For similar reasons, OGT's OCI allegations fail. Any possible advantage that F3EA may have had in responding to the sample task orders selected for SOF RAPTOR IV as a result of its performance of SOF RAPTOR III is a natural advantage of incumbency. "Incumbent status, without more, typically does not constitute 'unequal access to information' for purposes of showing an OCI." *Sys. Plus, Inc. v. United States*, 69 Fed. Cl. 757, 772 (2006). GAO decisions similarly confirm that "the government is not necessarily required to equalize competition to compensate for such an advantage, unless there is evidence of preferential treatment or other improper action." *Superlative Tech., Inc.*, B-415405.2, 2018 CPD ¶ 19, 2018 WL 585679, *5 (Jan. 5, 2018); *see also Lovelace Sci. & Tech. Servs.*, B-412345, 2016 CPD ¶ 23, 2016 WL 359122, *8 (Jan. 19, 2016); *QinetiQ N. Am., Inc.*, B-405008.2, 2011 CPD ¶ 154, 2011 WL 357875, *9 (July 27, 2011).

This, however, does not end the Court's inquiry because the above-quoted emails also raised allegations that [RM] specifically conducted the procurement in a manner that would favor F3EA. *See* FAR 9.508 (providing that the FAR does not provide an "all inclusive" list of all possible conflicts of interests); *see also Harkcon, Inc. v. United States*, 133 Fed. Cl. 441, 461–66 (2017). While these allegations may not fit squarely within a PIA or OCI framework, they certainly raise questions regarding whether the procurement was "conducted in a manner above reproach and ... with complete impartiality and preferential treatment for none[.]" FAR 3.101-1. This FAR provision further instructs that "[t]he general rule is to avoid strictly any conflict of interest *or even the appearance of a conflict of interest in Government-contractor relationships*." FAR 3.101-1 (emphasis added); *see also* FAR 1.602-2 ("Contracting officers shall ... ensure that contractors receive impartial, fair, and equitable treatment[.]"). [27] Indeed, these objectives are so central to the procurement system as a whole that even the mere appearance of impropriety can be sufficient grounds to disqualify an offeror. *See NKF Eng'g, Inc. v. United States*, 805 F.2d 372, 376–77 (Fed. Cir. 1986).

[38] **[39]** As with all agency decision-making, the Court must analyze whether the Agency conducted an adequate investigation consistent with the arbitrary and capricious standard of review. *See PAI Corp. v. United States*, 614 F.3d 1347, 1352–53 (Fed. Cir. 2010) (reviewing conflict of intertest investigation under APA standard); *cf. Former Emps. of Ameriphone, Inc. v. United States*, 288 F. Supp. 2d 1353, 1355 (C.I.T. 2003) ("Courts have not hesitated to set aside agency determinations which are the product of perfunctory investigations." (footnote omitted)). Notwithstanding the significant discretion vested in procurement officials, this Court must ascertain whether there exists a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. 2856 (internal quotation marks omitted). For the reasons explained below, the Court is greatly ***116** troubled by the Agency's circumscribed investigation and, even more so, by the facts that came to light as a result of this bid protest action. *See PCCP Constructors, JV*, B-405036, 2011 CPD ¶ 156, 2011 WL 3510746, *18 (Aug. 4, 2011) ("In our view, the agency's failure to reasonably investigate the OCI taints the integrity of the procurement process.").

First, as part of the Agency's investigation into OGT's allegations, the PCO reviewed written statements that four individuals involved in the evaluation process submitted to the Agency and conducted two in-person interviews. AR 2041–44. They all categorically denied that F3EA was involved in any way in selecting the STOs for the SOF RAPTOR IV RFP and that they never saw or heard any action that would lead them to believe that [RM] was steering the award to F3EA. *Id.* [RM] also submitted a written statement, in which he issued similar blanket denials. AR 2044–45. While such efforts are certainly the start of a reasonable investigation, this is where the Agency *decided to conclude* its investigation. The Court holds that the failure to do more was insufficient under the facts of this case. *Cf. AAR Mfg., Inc. v. United States*, 149 Fed. Cl. 514, 529 (2020) (describing a reasonable OCI investigation and rejecting the plaintiff's assertion that the contracting officer "merely

rubber-stamp[ed] rote affidavits"). In particular, the Agency should have, but never, interviewed either F3EA [* * *], who was mentioned by name in the allegations, or, more critically, *the two former F3EA employees who raised the allegations*. The PCO in his May 1, 2020 PIA memorandum, observed that the allegations "did not provide a timeline of when the statements and discussions occurred, the topics of the discussion and who were other parties that were present." AR 2569–72. This is certainly an appropriate observation for an investigator to make but begs the question why the Agency *did not follow-up with the individuals making the allegations*. Rather than conducting any follow-up, the Agency summarily closed the investigation, reflecting a lack of curiosity that could only be described as ostrich-like. In an investigation that counsel of record for the government framed as "com[ing] down to a credibility question," *see* ECF No. 45 ("Oral Argument Tr.") at 118:8, it is inadequate, at best, and sloppy, at worst, not to interview (or at least attempt to interview) the individuals who made the allegations. In that regard, the government could not explain how a credibility determination – which, by definition, is relative when dealing with two mutually exclusive versions of the facts – can be made by talking to only one set of putative witnesses. *See id.* at 118:5–127:20.

Second, the Court's further review of the final, corrected administrative record revealed that [RM] played multiple roles in the procurement and that he reviewed his own work. For the past performance volume of the proposal, offerors were permitted to submit five contracts that were evaluated for relevancy and confidence. AR 1700, 1715–16. Offerors also were required to submit a completed PPQ for each past performance contract reference. AR 1701. F3EA submitted [* * *] previously completed contract references from the incumbent SOF RAPTOR III vehicle. AR 3246–48, 3358. *The PPQs and the additionally provided contractor performance assessment reporting system ("CPARS") reports for F3EA all were provided by [RM]*. AR 3246–48. On all five CPARSs, [RM] rated F3EA "exceptional" in every category and provided glowing narratives of F3EA's work on the SOF RAPTOR III. AR 3278–91, 3329. All the PPQs were rated "outstanding" for every section of each contract and, likewise, provided glowing narrative. AR 3292–3324. All of these documents formed the basis for F3EA's past performance volume evaluation that was conducted by a team of SOF RAPTOR IV evaluators, which reported to the SSEB Chair, [RM]. AR 1631.

This case is far more concerning than other cases where courts declined to find any impropriety. In *Galen Medical Associates, Inc. v. United States*, for example, the Federal Circuit held that the plaintiff failed to demonstrate the appearance of a conflict of interest based on allegations that an evaluation panel member was also listed as a potential past performance reference, with whom the agency might consult. 369 F.3d 1324, 1335 (Fed. Cir. 2004). In that case, however, ***117** the Federal Circuit emphasized that there was no evidence that the evaluator "had been contacted and agreed to serve as a past-performance reference" and, therefore, "the mere fact that [the offeror] listed an evaluator as a past performance reference does not constitute a conflict of interest." *Id.* at 1336–37. In *EFW, Inc. v. United States*, a case with facts slightly more analogous to the instant one, this Court held that the plaintiff failed to show improper conduct where a member of the SSEB also authored a PPQ for one of the seven contracts that the offeror submitted in its past performance volume. 148 Fed. Cl. 396, 405–06 (2020). But, in that latter case, the SSEB member only "evaluated *a single* prior contract" and, more importantly, he only rated the offeror "with a 'Satisfactory' technical performance evaluation." *Id.* (emphasis added).

Both of these cases stand in stark contrast to the instant case for the simple reason that in *Galen Medical* and *EFW* the respective court was at least able to discern based on the particular facts why there was no material conflict or appearance of a conflict. Here, however, F3EA submitted five past performance contract references in its proposal. And, for each of those five contracts, SSEB Chair [RM] provided the very PPQs in which he rated F3EA as "outstanding" in every category. AR 3292–3324. Then, as the SSEB Chair, [RM] oversaw the evaluations of F3EA, which included the evaluation of F3EA's proposal, including its past performance volume containing [RM's] completed PPQs. Whether or not this structure and process constituted an actual (prohibited) conflict of interest, the circumstances certainly warranted a more detailed and thorough investigation in light of the allegations for which there were hard facts provided to the Agency (and the GAO).

Third, and most troubling, is the Agency's total obfuscation of [RM's] role in this procurement. Until late in this litigation, the Court had been working with the premise of OGT's allegation that [RM] was the contracting officer representative ("COR") for SOF RAPTOR III and a point of contact somehow involved with SOF RAPTOR IV, but the Court and presumably OGT were unsure about his precise

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role.[28] Indeed, even the government's counsel asserted that they did not know what [RM's] precise role was in the procurement at issue, as evident from the following exchange during oral argument:

> THE COURT: Well, was [RM] on the evaluation team as well in any capacity?
>
> MR. PIXLEY: I don't think the record establishes that....
>
> THE COURT: Do you know?
>
> MR. PIXLEY: I do not know.
>
> THE COURT: Does agency counsel know?
>
> MR. PARENT: No, you honor.

Oral Argument Tr. at 122:15–122:22. The government emphasized – erroneously, as it turns out – that regardless of whatever role [RM] may have played in the evaluations, "there was a separate source selection evaluation board." *Id.* at 122:25–123:1.

Further review of the administrative record, however – particularly after the government filed its May 25, 2021, corrected version of that record – uncovered that [RM] was most certainly involved in the evaluations; as noted above, *he was the SSEB Chairperson*. AR 1631. As such, he was charged with writing the PER containing "the adjectival assessments for each factor and subfactor as well as a Cost/Price report and the supporting rationale." AR 1627. Furthermore, he was essentially in charge of all the evaluators (including [JL], [GH], [ZH], and [MD]) and the capability factor chairperson ([JS]) – all of whom provided written statements or were interviewed as part of the Agency's limited investigation of OGT's allegations regarding [RM]. AR 1627, 1631. The Court finds it quite disturbing that this critical detail was omitted from the investigation memoranda. *See* AR 2037–46, 2569–72. Moreover, this most certainly raises serious questions regarding the propriety of [RM's] submitting PPQs on behalf of F3EA and then ***118** objectively "adjectively assess[ing]" his own work. AR 1627.

It only gets worse from here.

In a sworn declaration submitted to GAO as part of OGT's second protest, [RM's] second line supervisor averred that "[she] saw no indication that he acted improperly during the source selection process." AR 3530. She then added that "[h]owever, for un-related reasons, I had another Government employee conduct an independent evaluation of the proposals for [SOF RAPTOR IV] which resulted in the updated Proposal Evaluation Report." *Id.* She did not elaborate on the nature of the "un-related reasons" for the updated PER, nor was it readily apparent from the administrative record. After the Court ordered the government to provide any additional documents relating to "[RM's] role in the procurement at any stage[,]" however, the government provided, *without any explanation for its original omission*, an April 30, 2020, letter, terminating [RM's] role as SSEB Chair. ECF No. 56. That termination letter is decidedly unhelpful for the government.

From that termination letter – ***provided for the first time in response to the Court's May 28, 2021 order*** – the Court learned the following:

> This termination is the result of *repeated inconsistencies within multiple revisions of the Proposal Evaluation Report (PER), including significant findings being omitted that were documented in the consensus roll up. These omissions resulted in incomplete evaluation review by the Source Selection Advisory Council and (SSAC) and SSA and incomplete evaluation information being provided to the Offerors during the debriefing.* As a result of multiple Government Accountability Office protests, *the Procuring Contracting Officer initiated corrective actions to review and amend the PER to ensure that the solicitation criteria was followed. The corrective action was to add the omitted information into the PER, review the findings for compliance and determine if the ratings assessed were still relevant considering the additional information. Each subsequent version of the PER has had significant areas of disagreement between the documented findings and the solicitation requirements or areas where the proposal citations do not support the rating that was assessed.* The fact that these areas seem to

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> persist with every new version of the PER has led to the conclusion that appointment of a new SSEB Chairperson is necessary.

AR 5388 (emphasis added).

Of course, given that this letter was not included in the administrative record until after all of the briefing, oral argument, and status conferences were concluded, the Court still has no idea what "significant findings [were] ... omitted" or precisely what "incomplete evaluation information [was] ... provided to the Offerors during the debriefing" or how the final version of the PER differed (if at all) from earlier versions and revisions in which [RM] had a role. *Id.* This disturbing document – produced way too late in the day for this litigation – certainly casts a long shadow over [RM's] conduct in his role as SSEB Chair during this procurement, lends more than a modicum of support to the allegations of F3EA's former employees, and was not addressed by either the PCO's investigation memoranda or counsel of record in this case. *See* AR 2037–46, 2569–71.

Moreover, [RM] himself omitted critical details from his declaration submitted to the GAO as part of the second protest (B-418427.6). AR 3842. In that declaration, [RM] described himself as the COR for SOF RAPTOR III, as well as having "played a role in the development and coordination of the [SOF RAPTOR] IV re-competition effort." *Id.*[29] Given OGT's allegations, however, [RM] effectively concealed his central role in the SOF RAPTOR IV evaluation process. That his role was significant is evident by the fact that the Agency determined that it was compelled to remove him from his position as SSEB Chair and to redo his work in whole or part. The obfuscation of these facts is unacceptable.

***119** The fact that the Agency removed [RM] from his role as SSEB Chair is yet further complicated by the apparent failure of the Agency to implement fully the corrective action to which the Agency committed itself before the GAO. In particular, although the Agency represented to GAO that, as part of corrective action, "[t]he Army will *reevaluate* proposals consistent with the solicitation, determine the impact of the *reevaluations* on the source selection decision, and document its *reevaluation*[,]" AR 348 (emphasis added), the Agency apparently did no such thing. In that regard, the SSAC Chairperson's memorandum, dated August 21, 2020, mischaracterized the Agency's commitment to GAO as follows:

> As a result of the information contained in the protest documents, the PCO petitioned the GAO to dismiss the protests based on the fact that the Government *would review the evaluation and take corrective action as necessary* to ensure that the evaluation was conducted in accordance with the solicitation requirements.

AR 3343 (emphasis added). But the Agency committed to GAO to do something far more specific than a vague undertaking of "corrective action as necessary." *Id.* Rather, the Agency committed to reevaluate proposals. A reevaluation of proposals strikes the Court as legally and factually quite different than merely conforming the PER to the underlying, original evaluations, which seems to be all that the Agency did, as the PCO noted in the same memorandum:

> As a result of the corrective action, *the PER was updated to reflect an accurate representation of the evaluation of the Offerors proposals inserting additional findings and ensuring that the findings were consistent with the evaluation criteria outlined in the solicitation*.

AR 3343-44 (emphasis added); *compare id. with* AR 1626-27 (describing complete evaluation process).

A similar characterization of the Agency's actual "corrective action" is contained in the source selection decision document:

> As a result, the PCO initiated corrective actions and arranged for an independent review of the evaluation.

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> *It was found that there were findings in the consensus roll ups that were not carried forward into the original PER. All PER information was reviewed and updated to reflect the additional information.*

AR 3350 (emphasis added) (noting that "the update did not change the award decision").

The Court holds that updating the PER plainly is not the same as reevaluating proposals. Had the Agency fully implemented its promised corrective action, perhaps it could have avoided this protest. Instead, the Court is left with yet further, unanswered questions regarding the Agency's conduct in this procurement and the role [RM] played in it.

* * * *

Given all of these facts – many of which should have been contained in documents filed as part of the original administrative record but which the Court was forced to order the government to provide – the Court concludes that the Agency's investigation into questions of improper conduct was patently insufficient and undermines the integrity of the procurement process and the award decision. Indeed, the Agency's actual corrective action, as implemented, raises yet further concerns with regard to the initially filed administrative record. The Court simply does not understand on what basis the government declined to include certain documents from the so-called " 'first' evaluation of proposals (before the GAO protest and corrective action)" – as opposed to "the second evaluation" – given that *there was no reevaluation*. ECF No. 47 at 2. Put yet differently, as far as the Court can tell, any and all documents relating to the so-called " 'first' evaluation" would have been relevant to the so-called "second evaluation" because the only thing that changed was the PER and the updated Source Selection Decision. *See* AR 3345, 3371 (updated Source Selection Decision noting that the SSAC "was briefed on 28 October 2019 to discuss evaluation progress" – which was part of the "first evaluation" as that term has been used by the government in this litigation). That is, *the updated PER and SSDD relied upon the original evaluation.* That is deeply disturbing, not only in terms of how the government ***120** shaped the administrative record here (and, apparently, before the GAO), but also in terms of the explanation the government previously provided to the Court regarding the initial record omissions. The Court expects the government to address these concerns in detail.

VI. INJUNCTIVE RELIEF

[40] The Tucker Act vests this Court to award "any relief that the court considers proper, including ... injunctive relief." 28 U.S.C. § 1491(b)(2); *see* RCFC 65. In evaluating whether permanent injunctive relief is warranted in a particular case, a court must consider: (1) whether the plaintiff has succeeded on the merits; (2) whether the plaintiff has shown irreparable harm without the issuance of the injunction; (3) whether the balance of the harms favors the award of injunctive relief; and (4) whether the injunction serves the public interest. *PGBA v. United States*, 389 F.3d 1219, 1228-29 (Fed. Cir. 2004).

As this Court explained at length above, OGT has succeeded on the merits of its claims that the Agency acted in an arbitrary and capricious manner in evaluating F3EA's and Lukos' proposals, not conducting discussions, and failing to sufficiently investigate the conduct of SSEB Chairperson [RM] and whether he improperly influenced the procurement.

[41] **[42]** **[43]** **[44]** In evaluating irreparable harm, "[t]he relevant inquiry ... is whether plaintiff has an adequate remedy in the absence of an injunction." *Magellan Corp. v. United States*, 27 Fed. Cl. 446, 447 (1993). In the bid protest context, "[a] lost opportunity to compete in a fair competitive bidding process for a contract is sufficient to demonstrate irreparable harm." *Magnum Opus*, 94 Fed. Cl. at 544. Moreover, "[t]he court has repeatedly held that the loss of potential profits from a government contract constitutes irreparable harm." *BINL, Inc. v. United States*, 106 Fed. Cl. 26, 49 (2012) (internal quotation marks omitted). Here, OGT was denied the opportunity to fairly compete for this valuable single award IDIQ, which had a potential value of $245 million. The Court, thus, agrees that OGT will suffer irreparable harm in the absence of an injunction.

[45] **[46]** In balancing the harms, the Court ordinarily is required to "give due regard to the interests of national defense and national security and the need for expeditious resolution of the action." 28 U.S.C. § 1491(b)(3); *see Afghan Am. Army Servs. Corp. v. United States*, 90 Fed. Cl. 341, 368 (2009). The government, however, already has agreed that the Court "should make any relief ruling without regard to any cost or disruption from terminating, recompeting, or reawarding the challenged contract." February JSR at 2–3. The government reaffirmed this agreement in the parties' June 2, 2021 joint status report. June JSR at 2. The Court is likewise

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mindful that the parties also represented to the Court "given the United States assertions that an abrupt cessation without a transition period could disrupt military readiness. ... [T]he parties will agree to cooperate to ensure a reasonable period of transition on any pending task orders that are being performed should there be a permanent injunction." *Id.*

[47] **[48]** Finally, the public interest favors this Court's granting an injunction, as "the public always has an interest in the integrity of the federal procurement system." *Starry Assocs., Inc. v. United States*, 127 Fed. Cl. 539, 550 (2016) (citing *Hosp. Klean of Tex., Inc. v. United States*, 65 Fed. Cl. 618, 624 (2005)); *see Ian, Evan & Alexander Corp. v. United States*, 136 Fed. Cl. 390, 429 (2018) ("An important public interest is served through conducting 'honest, open, and fair competition' under the FAR, because such competition improves the overall value delivered to the government in the long term." (quoting *CW Gov't Travel, Inc. v. United States*, 110 Fed. Cl. 462, 495 (2013))); *MVM, Inc. v. United States*, 46 Fed. Cl. 137, 143 (2000) ("Many cases have recognized that the public interest is served when there is integrity in the public procurement system."). This is particularly true where, as here, there are substantial allegations of impropriety, the Agency's investigation of those allegations was patently insufficient, and where the government apparently failed to implement the ***121** corrective action to which it had committed before the GAO.

CONCLUSION

For the above reasons, the Court: **GRANTS** both OGT's motion to amend its complaint and OGT's motion for judgment on the administrative record (including OGT's request for permanent injunctive relief); **DENIES** the government's motion to dismiss for lack of standing and motion for judgment on the administrative record; and **DENIES** F3EA's motion for judgment on the administrative record.

The Agency hereby is enjoined from proceeding with its contract award to F3EA, with the exception of already awarded task orders that currently are being performed. Given the defects in F3EA's and Lukos' respective proposals identified above, the Agency's failure to conduct discussions, as well as the Agency's inadequate investigation into alleged wrongdoing by the SSEB Chair, the Court concludes that it has no choice but to order the Agency either: (1) to resolicit this procurement from its inception; *or* (2) to reopen the procurement to conduct discussions and accept new final proposal revisions from offerors. In either case, the Agency must conduct an entirely new set of evaluations, consistent with the Court's understanding of the corrective action the Agency committed to undertake before GAO. In implementing either of these foregoing options, and to ensure compliance with FAR 3.101-1 and FAR 1.602-2, the Agency shall further consider and investigate OGT's allegations and the related concerns the Court identified above, although the Court declines to superintend that process or otherwise provide detailed instructions to the Agency.

Finally, pursuant to RCFC 11 and this Court's inherent authority, the Court orders the government to show cause why monetary sanctions should not be imposed against Defendant for its piecemeal and improper handling of the administrative record in this matter. The government shall specifically address the DCMA report regarding Lukos, AR 4993–5006, as well as the [RM] termination letter, AR 5388–89. The government shall file a brief addressing this issue not to exceed ten (10) pages, doublespaced, 12 pt. Times New Roman font, **on or before August 17, 2021**. OGT may file a response brief, subject to the same page length and formatting constraints, **on or before August 24, 2021**. The Court expects OGT to address any prejudice it may have suffered by the late disclosure of the aforementioned documents and, in particular, the extent to which OGT was aware of the specific information contained in those documents during the pendency of the GAO protest. The government may file a reply brief, subject to the same formatting constraints but not to exceed five (5) pages, **on or before August 31, 2021**.

IT IS SO ORDERED.

All Citations

155 Fed.Cl. 84

Footnotes

* On August 2, 2021, the Court filed, under seal, this opinion and order and provided the parties the opportunity to propose redactions. On August 16, 2021, the parties filed joint proposed redactions, ECF No. 72, which this Court adopts, in part, and accordingly reissues this public version of this opinion and order. Redacted information is noted with [* * *] and redacted names are noted with bracketed initials.

1 This background section constitutes the Court's findings of fact drawn from the administrative record. *See infra* Section III. Citations to the administrative record (ECF No. 23, as amended by ECF Nos. 49, 56, 59, 65) are denoted as "AR".

2 "DCMA" refers to the "Defense Contract Management Agency" and "DCAA" refers to the "Defense Contract Audit Agency."

3 Of note, neither the Court nor OGT learned the truth about [RM's] role in the procurement at issue until late in this litigation.

4 In many of the administrative record documents, the various offerors are referred to by a single letter. *See, e.g.*, AR 3350. For example, OGT is "Offeror B," F3EA is "Offeror E," and Lukos is " Offeror H."

5 In January 2020, OGT also filed a size protest with the Small Business Administration ("SBA"), contesting F3EA's classification as small under the applicable size determination for SOF RAPTOR IV, which protest the SBA Area Office denied in a decision that the SBA Office of Hearings and Appeals ultimately affirmed. *Oak Grove Tech., LLC*, SBA No. SIZ-6051, 2020 WL 2107083 (Apr. 20, 2020).

6 It does not appear from the record that OGT knew of [RM's] role in this procurement at the time OGT made the allegations against him. *See supra* n.3; *see also infra* Section V.C.

7 Four other unsuccessful offerors separately filed protests with GAO, as well. AR 4070. Following the Army's notification of its intent to take corrective action, GAO similarly dismissed these protests as academic. *Id.*

8 After conducting the corrective action, the Army found that only two proposals were actually awardable, F3EA and Lukos, as the third offeror that was originally found to be awardable was later determined to be unacceptable for award. AR 3350.

9 Although the Court is not convinced that an amended complaint is required to support OGT's arguments regarding Lukos' proposal, the Court hereby **GRANTS** OGT's motion for leave to file an amended complaint, ECF No. 34, to the extent that OGT's argument would require additional supporting factual allegations. Particularly in light of the fact that the government does not oppose OGT's motion and the fact that F3EA had an opportunity to address all of OGT's arguments, the Court concludes that the amended complaint does not prejudice F3EA in any way and, thus, there is no basis to deny OGT's motion.

10 The Agency issued this letter, terminating [RM] from his role as SSEB Chair, during corrective action, before the Agency's second award decision. *See* AR 5388.

11 *See, e.g.*, AR 3372–3425.

12 May 28, 2021 Status Conference Tr. at 44:10–19 ("THE COURT: Well, let me ask you this, Mr. Pixley. Are there any other documents that were not considered especially relevant that were excluded? MR. PIXLEY: I think there are a whole bunch. For example, there were seven other offerors, Offeror A, Offeror J, okay, we didn't include the other IDIQ participants. THE COURT: But Offeror H has been at issue here the whole time. MR. PIXLEY: Yes, yes.").

13 While there is a distinction between the GAO's record production requirements and the Court's Rules governing the filing of the administrative record, the Court is concerned that the Agency, having failed to disclose relevant facts and documents during the GAO protest, attempted to protect itself by continuing its obfuscation during this case. *See* K. Sacilotto & J. Frazee, *Is a Record by Any Other Name Still a Record?*, at *1 (American Bar Association 2021 Public Contract Law Virtual Federal Procurement Institute Mar. 12, 2021), *available at* https://www.americanbar.org/events-cle/ecd/ondemand/409718248/ (explaining that in contrast to GAO protest proceedings, "the COFC rules expressly requires production of the administrative record, without the need for the protester to explain the relevancy of those documents to the protest arguments raised" and that "the 'relevant' documents produced [at the GAO] can be a fraction of the *actual* record of the procurement before the agency evaluators and source selection authority" (emphasis in original)).

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14 Sacilotto & Frazee, *supra* n.13, at *2 (“As a result of these differences in record contents, some protests that GAO has denied are later sustained at the Court, and the difference in decision ... can be tied to the more fulsome record produced at the Court versus the GAO.”).

15 To the extent GAO has held that a Section L proposal instruction cannot be material unless there is precise, corresponding Section M evaluation criteria, *see* Intv. MJAR at 67-68, this Court disagrees.

16 Although the words “supporting documentation” are located in the sentence addressing “previous teaming arrangements,” the Court, as it must, reads the Solicitation as a whole, and finds that this rationale obviously applies to the requirement for submitting “executed teaming arrangements” in support of an offeror's proposal for completing future work on the SOF RAPTOR IV. In light of the Court's conclusion that the requirement to substantiate teaming arrangements is a material term of the solicitation, the Court need not reach the issue of whether a Section L instruction regarding an unevaluated volume of a proposal may serve as a basis for disqualifying a proposal. *See* Intv. MJAR at 67-68 (arguing that lack of Section M evaluation criteria obviated the need for F3EA to comply with Section L.7.7).

17 The government bizarrely argues that the RFP's requirement that offerors provide teaming agreements “as applicable” means only that the offeror must provide the teaming arrangement if the parties “actually had a written teaming agreement ... which is not a given between contractors.” Def. MJAR at 55 (internal quotation marks omitted). This argument borders on the absurd because “as applicable” most certainly refers to a situation where the offeror claims the experience and capabilities of a planned team member or subcontractor, as in the instant case. According to the government's argument, the Agency believed it might be important to review the terms of a teaming agreement if it existed but otherwise did not care if the claimed relationship was purely fictional. The argument virtually refutes itself.

18 For example, “[* * *], [* * *], and [* * *].” AR 3140, 3141.

19 The government argues, in the alternative, that F3EA complied with the teaming agreement instruction by including “documentation of its contractual relationship with [* * *], in F3EA's Volume II past performance submission.” Def. MJAR at 55. The Court rejects the government's argument that merely submitting past performance contracts is the same as providing an executed teaming agreement. And, in any event, the Court reviewed the [* * *] past performance contract references that F3EA submitted to the Agency but could not find how those contracts demonstrate any relationship between F3EA and [* * *]. *See* AR 3249–50.

20 To be clear, the government did not move to supplement the administrative record with any declaration or affidavit from the PCO.

21 In contrast, GAO appears to treat the government's discretion as unreviewable. In *Booz Allen Hamilton, Inc*., the protester argued that the Navy abused its discretion by failing to hold discussions with the offerors. *Booz Allen Hamilton, Inc*., B-405993, 2012 CPD ¶ 30, 2012 WL 310875 (Jan. 19, 2012). The solicitation at issue, however, expressly advised that the agency contemplated making award without discussions. *Id.* at *2. GAO concluded that in such circumstances “[a]n agency's decision not to initiate discussions is a matter we generally will not review.” *Id.* at *11 (citing cases and concluding that “[t]o the extent our decision in *The Jonathan Corp.*; *Metro Mach. Corp.*, B–251698.3, B–251698.4, May 17, 1993, 93–2 CPD ¶ 174 at 15, establishes a different rule, it will no longer be followed.”).

22 Although the DFARS provision at issue employs the word “should” when delineating an agency's obligation to engage in discussions in a procurement in excess of $100 million, the Federal Circuit specifically quoted the Supreme Court's decision in *SAS Inst., Inc. v. Iancu*, —— U.S. ——, 138 S. Ct. 1348, 1354, 200 L.Ed.2d 695 (2018), for the proposition that “[t]he word ‘shall’ generally imposes a nondiscretionary duty.” *Dell Fed. Sys.*, 906 F.3d at 995-96. Nevertheless, the Federal Circuit recognized – based on FAR 2.101’s definition of the operative term “should” as well as GAO precedent – “that DFARS 215.306(c)(1) is reasonably read to mean [only] that ‘discussions are the *expected course of action* in [Department of Defense] procurements valued over $100 million[.]’ ” *Id.* at 996 (emphasis in original) (quoting *Sci. Applications Int'l Corp.*, B-413501, 2016 CPD ¶ 328, 2016 WL 6892429, *8 (Nov. 9, 2016)).

23 *See Flight Safety Int'l v. United States,* No. 15-1010C, ECF No. 12 (Fed. Cl. Sept. 15, 2015) (unpublished order), at *1–*2 (agreeing with the plaintiff's argument that DFARS 215.306(c)(1) “which contains the word

'should,' occupies the ground somewhere between 'may' and 'must' and in light of this wording there must be reasonableness on the part of the Agency not to conduct discussions").

24 Defense Federal Acquisition Regulation Supplement; Discussions Prior to Contract Award (DFARS Case 2010-D013), 75 Fed. Reg. 71647-01, 71648 (Nov. 24, 2010) (explaining that "failure to hold discussions in high-dollar value, more complex source selections has led to misunderstandings of Government requirements by industry and flaws in the Government's evaluation of offerors' proposals, leading to protests that have been sustained, and ultimately extending source-selection timelines. DoD proposes to decrease the possibility of this outcome by making such discussions the default procedure for source selections for procurements at or above $100 million.").

25 In *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007), the Federal Circuit established this doctrine "to prevent contractors from taking advantage of the government, protect other bidders by assuring that all bidders bid on the same specifications, and materially aid the administration of government contracts by requiring that ambiguities be raised before the contract is bid, thus avoiding costly litigation after the fact." *Id.* at 1313–14 (citation omitted).

26 *See also* FAR 3.104 (Procurement integrity).

27 Department of Defense guidance also reflects the types of concerns that OGT raises here. *See* DOD Contracting Officer's Representative Handbook, at 23–24 (Mar. 22, 2012), *available at* https://www.acq.osd.mil/dpap/cpic/cp/docs/USA00139012_DoD_COR_Handbook_Signed.pdf (explaining that "[p]rivate firms must be able to compete for the Government's business on a scrupulously fair basis" and that "increas[ing] the prospects for award to another vendor is an obviously unfair practice"); *see also* Department of Defense Office of Inspector General, Report No. D-2008-094, at 20–21 (May 20, 2008), *available at* https://media.defense.gov/2019/May/13/2002131090/-1/-1/1/DODIG-2008-094.PDF (investigation report finding "a pattern of behavior that gave an advantage to [a particular contractor] in competing for the contract and so constituted preferential treatment" in violation of FAR 3.101).

28 *See* AR 25-26; Pl. MJAR at 1 (referring to [RM] as the COR for SOF RAPTOR III). The FAR defines COR as "an individual, including a contracting officer's technical representative (COTR), designated and authorized in writing by the contracting officer to perform specific technical or administrative functions." FAR 2.101.

29 Similarly, the government's administrative record index describes [RM] as merely an "Assistant Project Manager." ECF No. 23 at 5; ECF No. 56 at 5.

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2021 WL 5114707
Only the Westlaw citation is currently available.
United States Court of Federal Claims.

OAK GROVE TECHNOLOGIES, LLC, Plaintiff,
v.
The UNITED STATES, Defendant,
and
F3EA, Inc., Defendant-Intervenor.

No. 21-775C
|
(Filed Under Seal: October 29, 2021)
|
(Filed: November 3, 2021)

Synopsis

Background: Unsuccessful offeror filed bid protest challenging decision by United States to award Army Special Operations Force contract to successful offeror. Successful offeror intervened. Government moved to dismiss. Parties moved for judgment on the administrative record, and unsuccessful offeror additionally moved for a preliminary injunction. The Court of Federal Claims, Matthew H. Solomson, J., 155 Fed.Cl. 84, granted in part and denied in part the motions, denied the cross motion, and ordered government to show cause why it should not be sanctioned for filing an insufficient administrative record.

Holdings: The Court of Federal Claims, Matthew H. Solomson, J., held that:

[1] Defense Contract Management Agency's (DCMA) initial omission of a DCMA pre-award report from the administrative record was unreasonable, and thus supported imposition of sanctions under the governing Court of Federal Claims rule;

[2] DCMA's initial omission of a letter terminating procurement official, from the administrative record, was unreasonable, and thus supported imposition of sanctions under the governing Court of Federal Claims rule;

[3] even if good faith were the relevant standard for determining sanctions, United States failed to establish good faith in initially omitting a letter terminating procurement official from the administrative record; and

[4] failure of DCMA to include letter terminating procurement official in the administrative record was harmful, and thus supported imposition of sanctions against United States .

Sanctions ordered.

Procedural Posture(s): Motion for Judgment on Administrative Record.

West Headnotes (16)

[1] Costs, Fees, and Sanctions

In imposing sanctions under the governing Court of Federal Claims rule, a court may allocate sanctions between an attorney and client according to their relative fault. RCFC, Rule 11.

[2] Costs, Fees, and Sanctions

While attorneys are usually held solely responsible for sanctions under the governing Court of Federal Claims rule the filing violating the rule is unwarranted by existing law, or a good faith argument for extension, modification, or reversal of existing law, an attorney and client may be held jointly and severally liable for filings that are not well grounded in fact. RCFC, Rule 11.

[3] Costs, Fees, and Sanctions

Certifications filed with an agency's administrative record compilation, and the filing of such administrative record compilations, generally, are subject to the governing Court of Federal Claims rule. RCFC, Rule 11.

[4] Costs, Fees, and Sanctions

Standard for imposing sanctions under the governing Court of Federal Claims rule does not require a finding of bad faith and does not excuse a violation based on a showing of subjective good faith; instead, the rule functions

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to assure that parties assert litigation positions that are objectively reasonable at the time of filing. RCFC, Rule 11.

[5] Public Contracts

In a bid protest, the administrative record need not consist of every single document related in any way to the procurement in question, but may be reasonably limited to materials relevant to the specific decisions being challenged. 28 U.S.C.A. § 1491(b).

[6] Public Contracts

In a bid protest, while government agencies need not include in an administrative record every single document related in any way to the procurement at issue, agencies must include in the record all documents related to their ultimate procurement decision. 28 U.S.C.A. § 1491(b).

[7] Public Contracts

In a bid protest, the administrative record consists of all documents and materials directly or indirectly considered by agency decision maker in making challenged decision. 28 U.S.C.A. § 1491(b).

[8] Public Contracts

In a bid protest, a proper administrative record is not limited to documents relevant only to merits of agency's decision, but also includes documents and materials relevant to the process of making the agency's decision.

[9] United States

Determining whether an agency's deliberative materials, such as internal comments, draft reports, emails, and meeting notes, are to be included in an administrative record for purposes of bringing suits against the United States, which requires consideration of the whole record, is not a matter of relevance; to the extent a deliberative document discloses the factors that were or were not considered by the agency, it may "go to the heart" of whether a decision was arbitrary and capricious. 28 U.S.C.A. § 1491(b).

[10] Federal Civil Procedure

In the discovery context, it is not for a party to determine, by a unilateral review of documentation to the case, whether information is relevant to the case.

[11] United States

Discovery regarding how an agency compiled, or what it omitted from, the administrative record, for purposes bringing suits against the United States, is not precluded. 28 U.S.C.A. § 1491(b).

[12] United States

In order to preserve meaningful judicial review of agency action under the statute governing suits against the United States, parties must be able to suggest a need for possibly limited discovery, aimed at determining, for example, whether other materials were considered. 28 U.S.C.A. § 1491(b).

[13] United States

Defense Contract Management Agency's (DCMA) initial omission of a DCMA pre-award report from the administrative record in unsuccessful offeror's bid protest challenging decision by United States to award Army Special Operations Force contract to successful offeror was unreasonable, and thus supported imposition of sanctions under the governing Court of Federal Claims rule; a central issue in this case was whether unsuccessful offeror even had standing to pursue its protest as an "interested party," such that offeror had to allege and then prove that both successful intervenor and another offeror were ineligible for award, DCMA made a deliberate decision not to include the report, and did not consult Justice Department counsel about

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that decision. 5 U.S.C.A. § 706; 28 U.S.C.A. § 1491(b); RCFC, Rule 11.

[14] United States

Defense Contract Management Agency's (DCMA) initial omission of a letter terminating procurement official from the administrative record in unsuccessful offeror's bid protest challenging decision by United States to award Army Special Operations Force contract to successful offeror was unreasonable, and thus supported imposition of sanctions under the governing Court of Federal Claims rule, although agency later determined that the letter was necessary to complete the administrative record because it related to the agency's decision-making at issue; while official may have played no role in the final bid-award decision or the final decision document itself, that did not mean that he had no influence on later work product. 5 U.S.C.A. § 706; 28 U.S.C.A. § 1491(b); RCFC, Rule 11.

[15] United States

Even if good faith were the relevant standard for determining sanctions under the governing Court of Federal Claims rule, United States failed to establish good faith in initially omitting a letter terminating procurement official from the administrative record in unsuccessful offeror's bid protest challenging decision by United States to award Army Special Operations Force contract to successful offeror, despite the existence of two documents that identified official as the Source Selection Evaluation Board (SSEB) chair; neither unsuccessful offeror nor court could be expected to have located those two needles in a 4,862 page haystack, United States throughout its merits briefing, repeatedly and exclusively, and erroneously referred to official as the contracting officer's representative. 5 U.S.C.A. § 706; 28 U.S.C.A. § 1491(b); RCFC, Rule 11.

[16] United States

Failure of Defense Contract Management Agency (DCMA) to include letter terminating procurement official in the administrative record in unsuccessful offeror's bid protest challenging decision by United States to award Army Special Operations Force contract to successful offeror, was harmful, and thus supported imposition of sanctions against United States in unsuccessful offeror's bid protest challenge, where omission of letter had the effect of concealing official's true role in the procurement and the precise nature of the corrective action that DCMA purportedly took to reevaluate the bids. 5 U.S.C.A. § 706; 28 U.S.C.A. § 1491(b); RCFC, Rule 11.

OPINION AND ORDER *

SOLOMSON, Judge.

I. BACKGROUND

***1** In the Court's decision on the merits of this case, the Court expressed the concern that the government's handling of the administrative record ("AR") "waste[d] judicial resources and undermine[d] trust in both the procurement and disputes processes." *Oak Grove Techs., LLC v. United States*, —— Fed. Cl. ——, ——, 2021 WL 3627111, at *13 (Aug. 2, 2021). Accordingly, the Court ordered the government "to show cause why Defendant should not be sanctioned for wasting the Court's (and Plaintiff's) time and resources on these administrative record deficiencies." *Id.* In particular, pursuant to Rule 11 of the Rules of the United States Court of Federal Claims ("RCFC") and this Court's inherent authority, this Court "order[ed] the government to show cause why monetary sanctions should not be imposed against Defendant for its piecemeal and improper handling of the administrative record in this matter." *Id.* at ——, 2021 WL 3627111, at *32. The Court specifically instructed the government to address its omission of two documents from the originally filed administrative record: (1) a Defense Contract Management Agency ("DCMA") report regarding Lukos (also referred to in the record as "Offeror H"), AR 4993–5006; and (2) what has been referred to as "the [RM] termination letter," AR 5388–89, which documented the Agency's removal of the first Source Selection Evaluation Board ("SSEB") Chairperson

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from his role in the procurement at issue. [1] *Oak Grove,* —— Fed. Cl. at ——, 2021 WL 3627111, at *32.

Regarding the RM termination letter, the Court explained at some length why that document was significant to the litigation and why it left the Court "with yet further, unanswered questions regarding the Agency's conduct in this procurement and the role [RM] played in it," as well as concerns regarding the nature of the corrective action and the "explanation the government previously provided to the Court regarding the initial record omissions." *Oak Grove,* —— Fed. Cl. at ——, 2021 WL 3627111, at *30. The Court noted that it "expect[ed] the government to address these concerns in detail." *Id.*

On August 17, 2021, and August 24, 2021, respectively, the government and plaintiff, Oak Grove Technologies, LLC ("Oak Grove"), filed responses to the Court's order to show cause. *See* ECF No. 75 ("Def. Resp."); ECF No. 76 ("Pl. Resp."). Despite the Court's having highlighted particular concerns in its merits decision, as noted *supra*, the government did not address them "in detail" or otherwise. *Oak Grove*, —— Fed. Cl. at ——, 2021 WL 3627111, at *30.

On August 26, 2021, the Court held a status conference to discuss further proceedings in this matter. ECF No. 77. Following that status conference, the Court ordered the government to file a reply brief for two purposes: (1) to respond to the arguments in Oak Grove's brief; and (2) to explain specific representations the government made in its merits briefs regarding the substance of the Agency's corrective action at issue, which the RM termination letter appeared to contradict. ECF No. 78 ("August 27, 2021 Order"). The government filed its reply brief on September 7, 2021. ECF No. 83 ("Def. Reply").

***2** On September 14, 2021, the Court held oral argument on the show cause order. ECF No. 89 ("Tr.").

After considering the parties' respective positions, the Court concludes that RCFC 11 warrants the imposition of sanctions on the government. The Court does not hold individual government counsel responsible for the fact that several critical documents were originally omitted from the administrative record. That does not mean, however, that the United States, acting by and through the Department of the Army (the "Agency"), can be let off the hook. The facts of this case and its procedural history demand some form of accountability for the government's mishandling of the administrative record.

Given that the predicate for sanctions is detailed at length in the Court's earlier decision, *Oak Grove,* —— Fed. Cl. at —— – ——, —— – ——, 2021 WL 3627111, at *9–*13, *28–*30, the Court repeats itself here only to the extent necessary to address the arguments in the briefing on the show cause order.

II. RCFC 11 GENERAL PRINCIPLES

The undersigned is hardly the first judge of this Court to consider whether sanctions are warranted, pursuant to RCFC 11, for the improper compilation of the administrative record. *See, e.g.*, *Coastal Env't Grp., Inc. v. United States*, 118 Fed. Cl. 15, 36 (2014) (imposing Rule 11 sanctions related to misconduct involving the administrative record); *Gallup, Inc. v. United States*, 131 Fed. Cl. 544, 547 (2017) (declining to impose Rule 11 sanctions where United States Special Operations Command agreed to pay plaintiff's attorney fees and litigation costs, committed to issuing guidance on the importance of integrity when preparing the record, and had begun planning training to prevent future disclosure problems). [2] Federal district courts from coast to coast have similarly recognized the possibility of sanctions for administrative record compilation failures. [3]

[1] **[2]** The Court begins with the text of RCFC 11, which provides, in part:

> If, after notice and a reasonable opportunity to respond, the court determines that RCFC 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, ***or party*** that violated the rule or is responsible for the violation.

***3** RCFC 11(c)(1) (emphasis added). Thus, a party may be sanctioned even if its counsel is not. [4] RCFC 11(b), in turn, provides (in relevant part):

> By presenting to the court a pleading, written motion, ***or other paper*** — whether by signing, filing,

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> submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: ... the factual contentions have evidentiary support ....

RCFC 11(b)(3) (emphasis added).

[3] In this case, the Agency's contracting officer "certif[ied] that to the best of [his] knowledge and belief, and after careful review," that the filed "documents constitute the record of the administrative actions performed in the above-referenced Solicitation that is relevant to the issues raised in the plaintiff's Complaint." ECF No. 23-1 at 1 (Certification of Contracting Office Administrative Record). This certification, and the filing of the administrative record generally, are subject to RCFC 11. *See Antonious v. Spalding & Evenflo Cos., Inc.*, 275 F.3d 1066, 1074 (Fed. Cir. 2002) (holding that the "obligation under Rule 11(b)(3) to conduct a proper prefiling investigation applies not only to the complaint but also to 'other paper[s]' filed in the case"). [5] The government nowhere contends otherwise.

In the show cause order, this Court ordered the government to address why monetary sanctions should not be imposed pursuant to RCFC 11 *and* the Court's inherent authority. *Oak Grove*, —— Fed. Cl. at ——, 2021 WL 3627111, at * 32. The government, in its response, entirely ignored the directive to address Rule 11 and addressed only the Court's inherent power to impose sanctions — which the government accurately describes as "narrowly circumscribed ... when there [is] no fraud or bad faith." Def. Resp. at 4. The government thus contends that "sanctions are not warranted because the issues associated with the AR in this case were not the product of bad faith or fraud." *Id.* at 5. According to the government, "all of the issues associated with the [AR] in this case were not due to any intentional omissions by the undersigned counsel" [6] but instead "were caused by the conception by the supporting contracting personnel ... as to what the full scope of the AR should include for this protest." Def. Resp. at 1. Put yet differently, the government maintains, "the [Agency] believed in good faith that it was complete, while simply failing to appreciate the potential relevance of the omitted documents to the issues in this protest." *Id.* at 3.

***4** **[4]** The government cannot escape sanctions by ignoring the applicable Rule 11 standard and pointing only to the heightened standard for imposing sanctions pursuant to a court's inherent powers. The Rule 11 standard for imposing sanctions does not require a finding of bad faith and does not excuse a violation based on a showing of subjective good faith. *See, e.g., Kilopass Tech., Inc. v. Sidense Corp.*, 738 F.3d 1302, 1313 (Fed. Cir. 2013) (explaining that Rule 11 "allows the imposition of punitive sanctions," "does not involve inquiry into a party's subjective good faith," and "does not require a showing of bad faith"). Instead, "Rule 11 functions to assure that parties assert litigation positions that are *objectively reasonable* at the time of filing." *Id.* (emphasis added). Supreme Court precedent also precludes a "good faith"-type defense to Rule 11 sanctions. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 47, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) ("Rule 11 ... imposes an objective standard of reasonable inquiry which does not mandate a finding of bad faith."). This objective standard is "intended to eliminate any 'empty-head pure-heart' justification[s] ...." Fed. R. Civ. P. 11 Advisory Committee Notes (1993 Amendment). [7]

Applying the correct Rule 11 standard to the facts here, the Court holds that the Agency's "fail[ure] to appreciate the potential relevance of the omitted documents to the issues in this protest" was neither reasonable nor excusable. Def. Resp. at 3. Moreover, the Court holds that the failure to include the documents at issue in the originally filed administrative record: (1) contributed to substantial delays in the resolution of this case; (2) wasted the Court's time in attempting to engage in fact finding on an incomplete record; and (3) had the effect of imposing costs on Oak Grove due to, at a minimum, additional briefing, status conferences, and hearings. In short, the Agency's withholding of the documents at issue from the initial filing of the administrative record harmed Oak Grove and the judicial process.

III. ADMINISTRATIVE RECORD REQUIREMENTS

Before turning to the specific documents covered by the show cause order (and the related issues on which the Court required briefing), the Court writes to amplify its previous rejection of the government's general premise, articulated repeatedly in this case — that an agency is entitled to subjectively decide what it believes is relevant to a plaintiff's claims for the purposes of compiling the administrative record. *See* ECF No. 47 at 2 (explaining that the government did not include certain documents in the record because it

considered them not "*especially* relevant or necessary to the instant protest" (emphasis added)); *Oak Grove*, —— Fed. Cl. at ——, 2021 WL 3627111, at *10–*12 (discussing RCFC App. C, rejecting the government's interpretation of it, and holding that "in compiling the administrative record, the government does not possess a unilateral veto over administrative record documents based on a self-serving conclusion that they are not relevant to the procurement decision under review").

A. The Administrative Record Must Include Documents Related to the Challenged Procurement Decision

[5] The Court begins with what it believes is common ground: "in a bid protest, the administrative record need not consist of every single document related in any way to the procurement in question, but may be reasonably limited to materials relevant to the specific decisions being challenged." *Tauri Grp., LLC v. United States*, 99 Fed. Cl. 475, 481 (2011). That is where the common ground ends, however, as the Court rejects the government's cramped view of the operational meaning of "relevant" in an action pursuant to 28 U.S.C. § 1491(b).

***5** **[6]** The Court holds that while government agencies need not include in an administrative record "every single document related in any way to the procurement" at issue, *Tauri Grp.*, 99 Fed. Cl. at 481, agencies must include in the record all documents related to their ultimate procurement decision. This standard is not new, and has been long articulated in both case law and by government agencies themselves. The U.S. Department of Justice, for example, recognizes that "[t]he administrative record is the paper trail that documents the agency's decision-making process and the basis for the agency's decision." U.S. Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record 1 (Jan. 1999) (providing "guidance to agencies in compiling the administrative record of agency decisions other than a formal rulemaking or an administrative adjudication"). [8]

[7] **[8]** Accordingly, "[t]he administrative record consists of all documents and materials directly *or indirectly* considered by the agency decision maker in making the challenged decision." *Id.* at 1–2. A proper administrative record "is not limited to documents relevant only to the merits of the agency's decision" but also "includes documents and materials relevant *to the process* of making the agency's decision." *Id.* at 2 (emphasis added). The Justice Department guidance even alludes to the sort of problems the Court has been forced to address herein. *See id.* at 1, 7 (warning that "[i]t is critical for the agency to take great care in compiling a complete administrative record" because "[i]t is worth the effort and may avoid unnecessary and/or *unfortunate litigation issues later on*" (emphasis added)).

Critically, the Justice Department advises agencies to include in the record "documents and materials" (1) whether they "support or do not support the final agency decision," (2) that either "were before *or available to* the decision-making office at the time the decision was made," and (3) that "were before the agency at the time of the challenged decision, *even if they were not specifically considered by the final agency decision*-maker." *Id.* at 2 (emphasis added). [9]

Although that Justice Department guidance document is non-binding and "does not create any rights," *id.* at 7, courts have routinely relied upon it in explaining what materials must be included in an administrative record. *See, e.g.*, *Sierra Club v. Zinke*, 2018 WL 3126401, at *3 (N.D. Cal. June 26, 2018) (explaining that "[t]he Department of Justice Guidance on compiling administrative records, promulgated in 1999, endorses producing materials that [plaintiffs] seek" and noting that "[t]his district has repeatedly required deliberative materials (such as internal comments, draft reports, emails, and meeting notes) to be added to the administrative record if they were considered in the agency's decision"). [10] In that case, the district court dispensed with the government's argument that so-called agency "deliberative documents" do not belong in the record. *See Sierra Club*, 2018 WL 3126401, at *3 (describing the government claim that "agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of a record filed with the court, nor listed in a privilege log" (emphasis in original)). The district court concluded that, with respect to such deliberative documents, "[t]he current Department of Justice position is contrary to the law in this Circuit." 2018 WL 3126401, at *3.

***6** **[9]** **[10]** This Court need not address the deliberative documents question in this case because the government has never asserted that the Agency relied upon such an exception to withhold the documents at issue. That said, the Court concurs with the United States District Court for the Southern District of Florida's view of relevancy, as applied to deliberative documents or any others:

> It is difficult to reconcile the notion that deliberative documents are irrelevant to judicial review [ ]with the APA's command that review is to be based on the "whole record." The definition of "whole record" — material that was directly or indirectly considered by agency decisionmakers — should be the agency's north star. Either a document was considered or it was not; *there is no obvious place for "relevance" under that standard*.

Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 2020 WL 2732340, at *5 (S.D. Fla. May 26, 2020) (emphasis added). The district court elaborated further on the issue of "relevance":

> [A]gency action is indeed judged based on the agency's stated rationale. ... [But that] does not mean that courts have no role in ensuring at the outset that they have been presented with the whole record. ... [I]t is also true that deliberative documents are prone to reveal the mental processes of decisionmakers — in fact, that is a requirement to claim the privilege, and such privileged documents should be excluded from the record. ... But that's not a matter of ***relevance***; to the extent a deliberative document discloses the factors that were or were not considered by the agency, it may "go to the heart" of whether a decision was arbitrary and capricious.

Id. (internal citations omitted) (emphasis in original); *see also id.* at *8 (holding "that deliberative documents may be withheld from the record only upon invocation of the deliberative process privilege, as documented in a privilege log"). By way of analogy, in the discovery context, "[i]t is not for a party to determine, by a unilateral review of documentation, whether information is relevant to the case." *Sanchez v. U.S. Airways, Inc.*, 202 F.R.D. 131, 135 (E.D. Pa. 2001). [11]

In sum, the government's view of relevancy in this case would undermine the requirement that the Court consider the "whole record." 5 U.S.C. § 706; *see also* L. Beck, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking*, Report for the Admin. Conf. of the U.S., at 31 (May 14, 2013) ("ACUS Report") (explaining that "using a 'relevancy' standard ... raises the question of whether application of such an intervening test would narrow the administrative record beyond the 'whole record' required for judicial review" and advising that "[a]gency guidance should avoid introducing subjective judgments regarding whether materials have been 'relied' upon or are 'relevant' "). [12]

B. Federal Circuit Precedent Does Not Preclude Discovery Regarding How an Agency Compiled, or What It Omitted from, the Administrative Record

***7** **[11]** In *Axiom Resource Management*, the Federal Circuit cautioned against "adding ... documents to the record without evaluating whether the record before the agency was sufficient to permit meaningful judicial review." 564 F.3d 1374, 1380 (Fed. Cir. 2009). That decision, however, provides no guidance on when documents that indisputably *were* before an agency properly may be *excluded* from the compiled administrative record. In that regard, while the government, in the undersigned's experience, typically (and correctly) has resisted the characterization of the administrative record as a "fiction," *see Naval Systems, Inc. v. United States,* 153 Fed. Cl. 166, 177–78 (2021) (discussing the compilation and contents of the administrative record), that is because that label suggests that the record is a fluid concept without boundaries; if the record is a mere "fiction," the record may include whatever the parties want this Court to consider. Neither the government nor this Court has any interest in returning to such a pre-*Axiom* world — and that would be improper post-*Axiom*, in any event. But the "necessary corollary" of the administrative record not being some fiction to which the parties may add whatever they please is that neither this Court nor plaintiffs should "have to police the government's filing as if routine discovery rules apply." *Oak Grove*, —— Fed.Cl. at ——, 2021 WL 3627111, at *12 (noting that "to a great extent, a plaintiff in a § 1491(b) action is at the mercy of the government to file a complete, certified record").

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Moreover, if the government is going to err on the side of excluding material from an agency record based on its own *sub-silentio* relevancy determinations, not only does that likely violate this Court's rules, [13] but also such a strategy will invite discovery battles surrounding the compilation of the administrative record that neither the government nor this Court wish to encourage.

[12] Parties — and particularly the government — should keep in mind that *Axiom* was concerned with this Court's not crossing the line from a proper APA review of agency action into *de novo* review by testing an agency's decision against evidence that was not before the agency. *Axiom*, 564 F.3d at 1380–82. Nothing in *Axiom*, however, would preclude this Court from following the guidance in *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345 (1997), that "[i]n order to preserve a meaningful judicial review, the parties must be able to suggest the need for ... possibly limited discovery, aimed at determining, for example, *whether other materials were considered* ...." 37 Fed. Cl. at 350 (emphasis added); *see also Naval Systems*, 153 Fed. Cl. at 182 (describing a "type of circumstance[ ] in which extra-record evidence should be considered" as including a protest arising "from the very omission of evidence upon which the Agency relie[d]"). To be clear, the Court is not talking about discovery to add materials to the record; that is something that *Axiom* generally precludes. But *Axiom* does not preclude discovery regarding *how* an agency compiled the administrative record or *what* was omitted from it. *Naval Systems*, 153 Fed. Cl. at 179 ("Nor has our Court clearly defined supplementation as the addition of evidence that the agency considered but omitted from the record."). [14]

Accordingly, and even considering the presumptions of good faith and regularity (as applied to the compilation of the administrative record), if the record was limited to only what the agency designated, "[e]ven material that was heavily considered by decision-makers would amount to 'extra-record' evidence if the agency failed to designate it." *Ctr. for Biological Diversity*, 2020 WL 2732340, at *3; *see also id.* at *6 (holding that "even accounting for the presumption of regularity," permitting too "large [of a] measure of discretion in determining the content of the administrative record ... risks frustrating effective judicial review"). The government should think hard about whether relying upon such circular logic and dubious relevancy determinations will benefit it in the long run.

***8** In any event, as discussed below, the Court holds that the Agency's failure to include the documents at issue in the initially filed administrative record was improper under not only the above-discussed Justice Department guidance — which, although non-binding, the Court views as accurately describing an agency's duty — but also under any definition of relevance.

IV. THE AGENCY UNREASONABLY OMITTED THE DOCUMENTS AT ISSUE FROM THE INITIAL ADMINISTRATIVE RECORD FILING

The Court notes, once again, that the factual findings surrounding the various debacles with the administrative record are detailed in the Court's merits decision. *Oak Grove*, —— Fed.Cl. at ——– – ——–, ——– – ——–, 2021 WL 3627111, at *9–*13, *28–*30. Accordingly, the Court endeavors to repeat facts, whether substantive or procedural, only to the extent necessary for context and clarity.

A. The DCMA Report

[13] The government contends that "the omission of the DCMA pre-award report did not come to *our* attention until oral argument in this case." Def. Resp. at 6 (emphasis added). The government does not make clear what it intends by the plural possessive "our" but to the extent it is meant to refer to the Department of Justice, the Court fully credits the assertion. *Id.* at 3 (representing that "the undersigned counsel was not aware of the two documents that are the subject of the show cause order" at the time the administrative record was filed). On the other hand, to the extent that the government asserts that *Agency* personnel, including the contracting officer, were not aware of the DCMA report, the Court rejects that contention. As the government itself noted, the Agency included the DCMA report at issue in the administrative record of a related GAO protest. Def. Reply at 8–9 n.5. The Agency's personnel clearly were aware of the DCMA report.

Thus, the only question the Court need decide is whether the contracting officer, acting on behalf of the Agency, reasonably concluded that the DCMA report was *not* properly part of the administrative record in this case. On *that* precise question, the government offered little to no explanation in its initial response to the Court's show cause order. Def. Resp. at 6–7. Indeed, the government forthrightly expressed its "regret that we (along with the Court and the parties) were not made

aware of this document" — presumably by the Agency — "until late in the proceedings." *Id.* at 7. The Court appreciates the government's candor and remorse, but that apology hardly excuses the fact that *the Agency* failed to include the DCMA report in the record until after both the completion of the merits briefing and oral argument.

The government in its reply brief asserts that "under the totality of these circumstances, with zero evidence of fraud or bad faith, penalizing the Government with *sanction[s]* amounts to a zero tolerance standard that is wholly inappropriate[.]" Def. Reply at 10 (emphasis in original). As the Court made clear, *supra*, however, Rule 11 does not require that this Court make a finding of fraud or bad faith to impose sanctions. To be clear, the Court does not suggest that mere accident or oversight are proper predicates for sanctions. Accordingly, the Court is not a proponent of, nor is the Court applying, a "zero tolerance standard." Rather, in this case, the government concedes that the Agency made a deliberate decision *not* to include the documents at issue, Tr. 13:3–22, and did not consult Justice Department counsel about that decision, Tr. at 11:12–15. The Court concludes that, in light of the facts and issues at the heart of this case, the Agency acted in an objectively unreasonable manner that is consistent with, at a minimum, an attempt to shape the record in its favor.

***9** The government troublingly proffers almost no explanation for *why* the Agency affirmatively declined to include the DCMA report in the initial AR in this case. The government asserts that both documents at issue "were not originally in the AR because they were not considered relevant to the instant protest as they pertained to the 'first' evaluation of proposals (before the GAO protest and corrective action), not the second evaluation currently being challenged." Def. Resp. at 3 (citing ECF No. 47). According to the government, the Agency "simply fail[ed] to appreciate the potential relevance of the omitted documents to the issues in this protest." *Id*. The Court rejects that explanation as objectively unreasonable. This rejection is not simply the Court's Monday-morning quarterbacking.

As explained in the Court's merits decision, a central issue in this case was whether Oak Grove even had standing to pursue its protest as an "interested party" pursuant to 28 U.S.C. § 1491(b). *Oak Grove*, —— Fed.Cl. at —— – ——, 2021 WL 3627111, at *7–8; Plaintiff's Motion for Judgment on the Administrative Record, ECF No. 27, at 14–18. In a nutshell, the government's consistent position — throughout the prior GAO litigation and before this Court — has been that Oak Grove lacked standing due to the existence of a so-called intervening offeror. Pl. Resp. at 6 (quoting the GAO record). The government's argument was that Oak Grove lacked standing because even if it could demonstrate that the Agency's contract award to Defendant-Intervenor was erroneous, Oak Grove still would not have had a substantial chance of receiving the contract award, as Offeror H *was* determined to be eligible for award, while Oak Grove was not. Thus, for Oak Grove to have standing, and to succeed on the merits, Oak Grove had to allege and then prove that both Defendant-Intervenor and Offeror H were ineligible for award. Pl. Resp. at 6.

Accordingly, the DCMA report was objectively and clearly material to the government's standing argument. As the Court previously explained, the DCMA report reflects a recommendation of "No Award" for Offeror H. *Oak Grove,* —— Fed.Cl. at ——, 2021 WL 3627111, at *18 (citing AR 4994). The RFP required the Agency, at a minimum, to consider that recommendation, if not follow it, but "[n]owhere does the record demonstrate that the Agency even considered this DCMA finding (assuming for the sake of argument that the contracting officer were permitted to depart from it)." *Oak Grove*, —— Fed.Cl. at ——, 2021 WL 3627111, at *18 (citing AR 1714 (RFP § M.4.3.7) and explaining that "[t]his document clearly demonstrates that [Offeror H] was found to be not financial[ly] capable and thus was not awardable consistent with the RFP's requirements"). Because the RFP required that the "Prime offeror *must* be deemed financially responsible by the Contracting Officer *based on* the Financial Capability Risk Assessment[,]" the notion that the DCMA report was immaterial to the government's standing argument is facially inconsistent not only with the findings in the document itself but also the obvious purpose for which the DCMA prepared it. AR 1714 (§ M.4.3.7) (emphasis added).

During oral argument on the show cause order, the government argued that the DCMA report was not relevant to the dispute because "the audit report is not a ground for finding [Offeror H] ineligible." Tr. 16:21–22. But that is nothing more than an argument on the merits, supporting the government's position on the standing question. The government cannot be permitted to make a self-serving merits determination to avoid producing certain (damaging) documents as part of the administrative record in the first place.

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Moreover, Oak Grove persuasively argues that the Agency went to some length to conceal what the administrative record revealed about Offeror H. For example, in the record submitted to the GAO, the Agency extensively redacted documents related to criticisms of Offeror H, including a notable redaction obscuring that it was "found [by DCMA] to be NOT financially capable of performing the contract." Pl. Resp. at 7 (depicting redacted evaluation document); *id.* at 8 (noting that Oak Grove "objected to these redactions" at the GAO). The Court agrees with Oak Grove that "[t]he Agency's arguments ignore that the Agency reviewed the DCMA report, believed it important enough to document in its [Prenegotiation Objective Memorandum / Price Negotiation Memorandum], but then chose to redact that information at GAO and to withhold the DCMA report from both GAO and this Court." Pl. Resp. at 8. While the Court cannot police the Agency's past conduct regarding the record before the GAO, there is no reason the Court cannot consider such conduct in determining whether the Agency had a reasonable basis to keep the DCMA report from Oak Grove and the Court in this proceeding. [15]

***10** Finally, the government argues that its AR production was extensive, but that fact supports, rather than undermines, Oak Grove's position. For example, the government observes that "[t]he AR that we filed in this case ... included the full record of the GAO proceedings pertaining to Oak Grove *as well as additional documents that were not included in the GAO record pertaining to Offeror H*." Def. Resp. at 2 (emphasis added). That assertion merely begs the question why, then, did the Agency deliberately omit the DCMA report, which also pertained to Offeror H? The government never suggested that the Agency's omission was simply inadvertent. And again, the Court cannot conclude that the Agency had a reasonable basis to omit the DCMA report from the record, particularly given the government's admission that the Agency included documents related to Offeror H in the initial administrative record filing with the Court. While the government now avers that it included such documents "because Oak Grove specifically challenged [Offeror H's] cost proposal ... [s]o documents were introduced with respect to that," Tr. 21:8–14, the problem is that RFP § M.4.3.7 (AR 1714) is located within the RFP's evaluation factors covering the "Cost/Price Evaluation" (§ M.4.3). AR 1713. [16] And § M.4.3.7 specifically required the consideration of the Financial Capability Risk Assessment DCMA prepared. The Agency cannot explain why that report is any less relevant to the § M.4.3 evaluation than all of the other cost proposal materials the Agency *did* include in its initial record filing. The most reasonable explanation, if not the only reasonable explanation, is that the Agency selectively omitted a document that was harmful to its position.

In sum, as Oak Grove argues, the Agency's failure to include the DCMA report "forced extensive added effort by this Court and the parties." Pl. Resp. at 10.

B. The RM Termination Letter

[14] On June 1, 2021, the government included the RM termination letter as part of a corrected AR filing, *see* ECF No. 55, made pursuant to the following court order:

> [C]ounsel of record for the government shall consult with the cognizant contracting officer to determine *whether any other documents relating to the agency's decision-making at issue* (e.g., the contract awardee's proposal, Offeror H's proposal, and/or [RM's] role in the procurement at any stage) were omitted from the administrative record. Counsel of record ***shall complete the administrative record*** and certify compliance with this order in a status report, on or before Friday, June 4, 2021, at 12:00 p.m.

ECF No. 53 (May 28, 2021, Order) (emphasis added). Thereafter, the government certified as follows:

> Pursuant to the Court's order of May 28, 2021, defendant, the United States, respectfully submits the following status report. This is to certify that, we have consulted with agency contracting officer in obtaining documents that were omitted from the administrative record, ***we have complied with the Court's order***

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> ***in correcting and completing the administrative record***.

ECF No. 60 (June 4, 2021, Status Report) (emphasis added). To be clear, then, the Court did not order the government to produce the termination letter specifically. Rather, the government apparently determined, when ordered to do so, that the document was necessary to complete the administrative record because it related "to the agency's decision-making at issue." In including the RM termination letter, the government thus implicitly agreed that the letter was necessary to complete and correct the administrative record. [17]

Equally important is what the government did not do. The government did not seek, for example, *in camera* review of the RM termination letter to establish that it was irrelevant either "to the agency's decision-making at issue" or otherwise to this case, generally. [18] Indeed, even now, the government does not assert that the Agency made the correct call with respect to the RM termination letter, but rather admits that had the government's counsel of record "been aware of the April 30, 2020 termination letter, [he] would have included it in the AR." Def. Resp. at 5. In other words, with respect to the RM termination letter (as with the DCMA report), the only question for the Court is whether the government's proffered excuse for the Agency — that it "simply fail[ed] to appreciate the potential relevance of the omitted document[ ] to the issues in this protest," Def. Resp. at 3 — is objectively reasonable. Based on the foregoing analysis alone, the Court answers that question in the negative. Nevertheless, the Court will address the government's additional arguments.

***11** Notwithstanding that the Agency produced the RM termination letter without being specifically ordered to do so, the government asserts, *post hoc*, that the document was irrelevant to this case based on a version of a harmless error argument. According to the government, the Agency "unintentionally and inadvertently omitted a document *that is helpful to the Government* in countering the protestor's allegation that [RM]" — the initial SSEB Chairperson — "may have improperly steered award to F3EA." Def. Resp. at 5–6 (emphasis added). That is true, the government posits, because "[a]lthough the termination letter is critical of [RM] in his role as SSEB chair ... the letter also demonstrates that [RM] had no role in the second source evaluation determination at issue in this protest." *Id.* at 5. The assertion that the RM termination letter "is helpful to the government" is "the kind of argument that only a lawyer could love," *Est. of Rao v. United States*, 987 F. Supp. 249, 253 (S.D.N.Y. 1997), and is demonstrably wrong.

First, before the government proffered this explanation, the Court already had found that "[t]he Agency issued this [termination] letter ... *during corrective action*, before the Agency's second award decision." *Oak Grove*, —— Fed.Cl. at —— n.10, 2021 WL 3627111, at *11 n.10 (citing AR 5388) (emphasis added). The government makes no attempt to address that factual finding with any specificity. Moreover, during the hearing on the show cause order, the government agreed with the Court's understanding of the RM termination letter:

> **The Court:** You can tell me that this is not accurate, but a sane, rational[-]person['s] reading [of] this is that there was corrective action, the corrective action was to review and amend the [proposal evaluation report ("PER")], there were multiple versions of that PER that were produced, there were still problems between the subsequent versions of the PER having disagreements between the documented findings and the requirements, and then, *since those persisted*, [RM] was replaced.
>
> Am I not reading that right?
>
> **[Government]:** No, that's what it says.

Tr. 30:1–11 (emphasis added). When the Court pressed the government regarding precisely when the Agency removed RM as SSEB Chairperson during the corrective action process, the government repeatedly admitted that it did not know. *Id.* at 30:15–20; 31:1–2 ("I don't know those details."). The Court remains uncertain how, in light of that exchange, the government could make the assertion that the RM termination somehow definitively "demonstrates that [RM] had no role in the second source evaluation determination." Def. Resp. at 5.

Second, during the show cause hearing, the Court asked the same question to a government witness, Mr. [DW], who replaced RM as SSEB Chairperson. *See* Tr. 31:19–21; AR 5390. Mr. [DW] responded that his involvement with the procurement began in February 2020 when "corrective actions *were ongoing*" and he was asked to "review ... the actions ... taken so far and provide ... an assessment" to his supervisor. Tr. 31:24–32:6 (emphasis added). As a result of Mr. [DW]'s analysis, "the recommendation to [the CO] was that [RM] be removed" and, thus, Mr. [DW] "was inserted

into the source selection as the source selection chair." [19] Tr. 32:11–14. Thus, there is no doubt that RM played a role in the corrective action from the conclusion of the GAO protest in January 2020, through at least part of the corrective action period, until his removal as SSEB Chairperson at the end of April 2020. Mr. [DW] informed the Court that RM only "made some initial drafts" that Mr. [DW] reviewed and that "never went forward" to be "acted on," *see* Tr. 32:19–25, but that is a far cry from definitively substantiating that RM — or, more critically, his work — played no role in the ultimate source selection decision at issue in this case.

***12** Mr. [DW]'s representations to the Court provide, if anything, good reason for Oak Grove (and the Court) to have concerns about how RM's prior work may have impacted the second source selection at issue here:

> **THE COURT:** Let me understand what you did not do. You did not take the initial evaluations, put them to the side, throw them in the trash can, and start the evaluation over from scratch of the proposals.
>
> **MR. [DW]:** We did not take all of them and set them aside and start again because, as I said, I could not do anything with[out] the two subject matter experts whose input was actually very critical in understanding the merits of the exercises that were part of Sections L and M.

Tr. 34:4–13. (Those subject matter experts who performed the initial proposal evaluations apparently were unavailable during corrective action.)

The Court remains perplexed by the government's unequivocal assertion that "[RM] played no role in the second evaluation ...." Def. Reply at 7. While he may have played no role in the final "August 2020 ... award" decision or the final decision document itself, *id*., that plainly does not mean that he had no influence on the work product Mr. [DW] and other Agency personnel considered or relied upon. In any case, Oak Grove was entitled to develop arguments on those subjects, but was deprived of the opportunity to do so.

Accordingly, the Court rejects the government's assertion that because "[RM] played no role in the second evaluation, the termination letter was not germane to the evaluation decision." Def. Reply at 7. RM's role and influence in this procurement was a central factual issue in Oak Grove's claims. The government's attempt to minimize his role in the procurement and the corrective action — based on the very termination letter which lends support to Oak Grove's central thesis — is rejected (and, in any event, is a *post hoc* rationale for why it was excluded from the record). In sum, the Court agrees with Oak Grove that "[c]ontrary to the [termination] Memorandum, the Agency sought to present a picture of objective, impartial involvement by [RM]" and that the termination letter "contradicts" — or, at the very least, arguably undermines — "the Agency's position" throughout this litigation. Pl. Resp. at 9 (noting that the AR did not otherwise "reveal[ ] internal concerns about [RM's] actions"). [20]

* * * *

All of this discussion leads the Court to address yet two additional arguments the government makes: (1) that "neither the [Agency] nor the Department of Justice concealed the fact of the prior role of [RM] as SSEB chair in the Raptor IV procurement" (*see* Def. Resp. at 5); and (2) that the government did not mischaracterize the Agency's corrective action (*see* Def. Reply at 2–7). The Court addresses each issue, in turn, below.

V. THE ADMINISTRATIVE RECORD, AS INITIALLY FILED, OBSCURED RM'S ROLE IN THE PROCUREMENT

***13** **[15]** With regard to RM's role in the procurement, the government notes that "[t]wo documents originally included in the GAO record, and included in the original AR that we filed in this Court on February 10, 2021, identified [RM] as the SSEB chair." Def. Resp. at 5 (citing AR 1582, 1631). The first reference is to a signature block on the second page of the Source Selection Plan (AR 1582); the second is to an organization chart depicting the "Source Selection Team Structure" (AR 1631). While the government argues that Oak Grove, therefore, was on notice of RM's true role and presumably could have sought additional documents earlier in the case, neither Oak Grove nor the Court can be expected to have located those two needles in a "4,862 page[ ]" haystack. Def. Resp. at 2. [21]

The existence of those documents does not demonstrate the government's good faith — even if good faith were the relevant standard for Rule 11 — particularly because the government, throughout its merits briefing, repeatedly and ***exclusively*** referred to RM as the contracting officer's representative or "COR." *See, e.g.*, ECF No. 30 at 59 ("COR [RM] allegedly discussed efforts to steer the procurement towards the awardee, F3EA"), 61 (arguing that "as a

Government official, [RM], the COR, is presumed to act lawfully"), 64–65 (quoting statement of "COR [RM]"), 70 (referring to "a COR, such as [RM]"). In one such reference, the government responds to an Oak Grove argument, noting as follows:

> Oak Grove cites to that portion of the OCI investigation report where the contracting officer summarized the statement of COR [RM], where [RM] stated, in effect, that, in creating the RAPTOR IV sample STOs, the [Agency] made significant changes to the RAPTOR III performance work statements "to mitigate the incumbent advantage."

ECF No. 30 at 69 (quoting AR 2044).

To the extent the government was discussing RM's role on the predecessor contract, it understandably refers to RM as the "COR." On the other hand, the above quote describes RM's knowledge of RAPTOR IV — the procurement at issue — in which he served as the SSEB Chairperson, not the COR. Similarly, in arguing that "[t]he contracting officer, in his discretion, unequivocally determined that [an] OCI did not exist in the RAPTOR IV procurement," the government asserted that such discretion "does not rest with a COR, such as [RM]." *Id.* at 70. This statement is misleading on its face (even if unintentionally so) because RM was not the COR, but rather the SSEB Chairperson, on RAPTOR IV.

The government's response brief (on the merits) repeats the same pattern and suffers from the same problem; it never once identifies RM as the SSEB Chairperson. For example, there is this statement:

> [T]he contracting officer *did* investigate the allegations by interviewing the contracting officer's representative (COR) [RM] and at least six other Government and contractor witnesses and reviewed written statements and documents: [RM] and the other witnesses *flatly denied* the allegations of wrongdoing lodged against COR [RM] by Oak Grove.

ECF No. 38 at 30 (emphasis in original). Of course, at that point, RM was the SSEB Chairperson on RAPTOR IV, and not just the COR on the predecessor contract.

***14** More significantly still — as highlighted in the Court's merits decision — as late as oral argument on the merits, neither the Justice Department nor Agency counsel themselves knew what role RM had played in the procurement at issue. *Oak Grove*, —— Fed.Cl. at ——, 2021 WL 3627111, at *28 (citing ECF No. 45 ("May 24, 2021 Tr.") at 122:15–22). To make matters worse, "[t]he government emphasized — erroneously, as it turns out — that regardless of whatever role [RM] may have played in the evaluations, 'there was a separate source selection evaluation board.' " —— Fed.Cl. at ——, 2021 WL 3627111, at *28 (quoting May 24, 2021 Tr. at 122:25 – 123:1). That statement was flat wrong given that RM managed the SSEB. And, even once RM had been replaced, there was no "separate" SSEB; the first SSEB's work was not redone (a difficulty the Court addresses below).

In sum, the assertion that the Court or Oak Grove *should have* discovered RM's true role in the RAPTOR IV procurement — based on just two bare references in the administrative record — when neither the Justice Department nor Agency counsel could tell the Court what role RM played in the procurement rings particularly hollow, as does the government's assertion that RM's role was "never raised." Tr. at 77:21–22. The government cannot claim ignorance of something so central to the case while simultaneously asserting that the plaintiff should have known it; to permit such a claim would be to allow the government to use the proverbial needle in a haystack as both a sword and shield.

The fact is that RM's role in this procurement was at the center of Oak Grove's case. Accordingly, the Court wholeheartedly agrees with Oak Grove's argument:

> Rather than saying, you know what, we had relevant documents that were missed, we failed to produce them, we're sorry, we've now been through multiple rounds of [the government] trying to justify something that is clearly indefensible. ...
>
> [T]he fact that [RM] had something to do with this procurement has been a centerpiece of our protest from the

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> get-go. We've been saying since the get-go that there's an impropriety here with him. ...
>
> And what [the government] did ... whether ... his role [is reflected] in some signature block ... [or] some [reference] buried somewhere [—] [the government] withheld a document by which they removed him as the SSEB chair from this procurement, and that removal is not reflected[.] [I]t's not reflected in their source selection decision document; it's not reflected in their Source Selection Advisory Committee memorandum; it's not reflected anywhere. And it wasn't produced to the Court until — this Court, because of its diligence, discovered that.
>
> And to put that on anybody but the party who's responsible for certifying this record is really blaming others for not finding needles in haystacks to question whether or not the United States properly put its record together. The United States' obligation is to put the record together.

Tr. at 81:16 – 82:17; *see Oak Grove*, —— Fed.Cl. at ——, 2021 WL 3627111, at *12 (holding that "plaintiffs must be entitled to rely upon the government's certification that the filed administrative record is complete" and that "[p]laintiffs should not have to police the government's filing as if routine discovery rules apply[,]" and noting that "to a great extent, a plaintiff in a § 1491(b) action is at the mercy of the government to file a complete, certified record").

The bottom line in the Court's view is that there are all sorts of arguments Oak Grove may have raised (or questions the Court may have asked) had the record timely contained the RM termination memorandum. The Court will not rehash its merits decision here; suffice it to say, the Court rejects the government's assertion of harmless error or any similar argument. [22]

VI. THE AGENCY'S CORRECTIVE ACTION

***15 [16]** The final issue from the show cause order briefing relates to how the government described the Agency's corrective action. This issue is important because the Court (and apparently Oak Grove) did not understand the nature of the corrective action — if it is even fair to describe it as such — until the RM termination letter was added to the administrative record. To explain the troubling nature of this issue, the Court compares: (1) the government's representations to GAO about the promised corrective action; *with* (2) the administrative record's description of the nature of the corrective action the Agency implemented; *and with* (3) the description of the corrective action in the RM termination memorandum.

As part of the show cause briefing schedule, the Court explained and ordered as follows:

> [T]he government in its motion for judgment on the administrative record ("MJAR") represented to the Court that following the initial GAO protest, "the SSEB convened to *evaluate proposals a second time*" and that "[t]he [Agency] received and *evaluated ten proposals*[.]" ECF No. 30 at 8 (emphasis added); *see id.* ("Of the ten proposals *reevaluated* ...." (emphasis added)). The Court had expected the parties to address this issue in the further briefing the Court had ordered, but the Court recognizes that it should have made this expectation explicit — and does so now.
>
> Accordingly, the government shall address, in its reply brief, whether in the originally filed administrative record (*i.e.*, in the absence of the RM termination letter) there is evidence that the Agency's corrective action only consisted of "review[ing] and amend[ing] the PER" and not reevaluating the proposals, as the Agency had represented at GAO. The government shall also address the above-quoted representations contained in its MJAR.

August 27, 2021 Order at 1–2.

The Agency "represented to GAO that, as part of corrective action, '[t]he [Agency] will *reevaluate* proposals consistent with the solicitation, determine the impact of the *reevaluations* on the source selection decision, and document its *reevaluation*[.]' " *Oak Grove*, —— Fed.Cl. at ——, 2021 WL 3627111, at *30 (quoting AR 348 (emphasis added)). Consistent with that representation, the government asserted that "the SSEB convened to evaluate proposals a second time." ECF No. 30 at 8. The initial administrative record is considerably vaguer about precisely what the putative "corrective action" consisted of, but there is nothing in the record clearly inconsistent with what the Agency committed to the GAO or the government's subsequent description to the Court — at least, there *was* not, until the RM termination letter was added to the record.

The RM termination letter described the corrective action as rather minimal. In particular, the RM termination letter reveals that " '[t]he corrective action was to add the omitted information into the PER, review the findings for compliance and determine if the ratings assessed were still relevant

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considering the additional information.' " *Id.* at ——, 2021 WL 3627111, at *29 (quoting AR 5388). *That* description gave the Court considerable pause and left the Court with the distinct impression — late in these proceedings — that the Agency did *not* reconvene the SSEB "to evaluate proposals a second time" and thus did not perform a "reevaluation" as it represented.

The government responds that: (1) "the [Agency], did, in fact, 'evaluate proposals a second time' "; and (2) the administrative record already disclosed the true nature of the correction action, and thus the RM termination letter did not reveal anything new to the parties or the Court. Def. Reply at 2, 4. The Court rejects both arguments.

The government's support for its first contention is that "evaluators changed many of the substantive ratings and evaluative results ...." Def. Reply at 2. While the government repeatedly focuses on what "[t]he [Agency] changed" — and argues that those changes "led *us* to reasonably conclude that the [Agency] evaluated proposals a 'second time' " — that assertion does not help it. Def. Reply at 3–4 (emphasis added). As an initial matter, the word "us" strikes the Court as strange. Even if "us" is intended to refer to the Justice Department, surely the Agency itself knows whether proposals were evaluated a second time. Does the Justice Department mean to say that it was misled by the Agency?

***16** The Court does not dwell on that semantic issue because, in any event, the Court's concern is not assuaged by the mere fact that there was a second award decision supported by a second evaluation document with different ratings than the first. Rather, the Court's concern is that the government represented that "the SSEB convened to evaluate proposals a second time" — the implication of "a second time" being *from scratch*. [23] In reality, however, the Agency simply assigned someone new to fix the award *documentation*, and only part of it, at that. *See, e.g.*, Tr. 33:11–19 ("Mr. [DW]: Cost price and past performance were not really picked up and readdressed. ... Technical was where the biggest issues were and where I focused my attention. I was not able to bring all the players back together. There were two special operations representatives. *We were unable to bring them back to reevaluate*." (emphasis added)); Tr. 34:8–13 ("Mr. [DW]: We did not take all of [the initial evaluations] and set them aside and start again because, as I said, I could not do anything with[out] the two subject matter experts whose input was actually very critical in understanding the merits of the exercises that were part of Section L and M.").

In sum, what Mr. [DW] did as RM's replacement as SSEB Chairperson was "reassess[ ] whether or not the original findings were accurate." Tr. 34:20–21; *see also* Tr. 36:15–20 ("We reviewed all of the original findings. ... [I]n the case of me being new, I added in what I had observed that was relevant to Factors L and M."). The fact that Mr. [DW] performed some sort of "reconciliation," and "came up with a consensus" used to revise the PER, Tr. 36:19–20, is plainly not the same as reconvening the SSEB to evaluate proposals a second time. The Court here in no way criticizes Mr. [DW]'s work, nor does the Court hold that agencies lack discretion to propose corrective action, including the scope of a proposed reevaluation. Rather, the Court is merely contrasting the Agency's representation of the planned corrective action to GAO with the Agency's actual corrective action — including as it was represented in the government's briefs — to underscore the potential significance of the RM termination letter. Oak Grove should have had the opportunity to make arguments about the possible implications of that document.

On that note, the government also contends, that "the [RM] termination letter did not present any new facts regarding the scope of corrective action performed than that contained in the original AR." (Def. Reply at 4). In support, the government relies on the following statement within the August 21, 2020, Memorandum for the Record from the "Source Selection Advisory Counsel Chairperson" (or "SSAC"):

> *As a result of the corrective action*, the PER was updated to reflect an accurate representation of the evaluation of the Offerors[']proposals inserting additional findings and ensuring that the findings were consistent with the evaluation criteria outlined in the solicitation.

AR 3343 (emphasis added), *quoted in* Def. Reply at 4. [24]

With the benefit of hindsight, and the RM termination letter now in hand, the Court understands how to properly read that summary. But, standing alone, that statement is ambiguous insofar as it suggests that updates to the PER were made "[a]s *a result of* the corrective action" — implying the updates followed a reevaluation. AR 3343 (emphasis added). In light of the Agency's commitment to GAO that the Agency

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would complete a reevaluation, and given the government's assertion in its brief that the Agency reconvened the SSEB, the Court reasonably (but obviously incorrectly) read the SSAC's memorandum as asserting that the PER was updated only after a complete reevaluation process. Again, whether deliberately or not, the Court was misled by the omission of the RM termination letter. The nature of the actual corrective action only became clear once the Court heard Mr. [DW]'s explanation at the show cause hearing.

17** The other document in the administrative record upon which the government relies — the August 28, 2020, Source Selection Decision Document ("SSDD") — suffers from a similar ambiguity. The SSDD notes that "the PCO initiated corrective actions ***and arranged for an independent review of the evaluation." AR 3350 (emphasis added) (quoted in Def. Reply at 4).[25] If anything, this makes it appear as if the Agency conducted a new, second evaluation — consistent with the corrective action promised to the GAO — and then, only after that reevaluation, arranged for an independent review of *that* second evaluation. Indeed, the SSDD indicates that a new contract award decision was made only "[a]fter a full review of the evaluation results from the SEEB members *and* ***my*** *independent review* of the evaluation documentation[,]" further suggesting that there was a full reevaluation and an independent review by the SSDD's author. AR 3350 (emphasis added). In other words, the phrase "my independent review" refers to one the Source Selection Authority conducted, leading readers away from understanding that the first referenced "independent review" *was itself* the corrective action conducted by the new SSEB Chairperson, Mr. [DW]. Moreover, the SSDD indicates that the new, final award decision is "[b]ased on the findings presented to the SSAC and Final SSEB PER," and that "the SSAC independently reviewed and compared *the results of the SSEB evaluation* and determined it was conducted in accordance with the factors set forth and the evaluation criteria in the solicitation ...." AR 3371 (emphasis added). Of course, not until the hearing on the show cause order did the Court learn that the SSEB was not reconvened or otherwise reconstituted — as noted, *supra*, several of the original evaluators were unavailable and were not reengaged.

More significantly, as counsel for Oak Grove argued, the limited corrective action implemented was entirely inappropriate where, as here, the SSEB Chairperson was removed "mid-corrective action" for "competency issues" and then, rather than "dump the PER" or "convene new people to conduct a new evaluation," the Agency continued "writing on [RM's] slate." Tr. 68:17 – 69:4. The Court agrees with Oak Grove:

> At the end of the day, ... [t]hey're working off [RM's] memo. They're working off his sheet. They're adjusting here; they're adjusting there. [But,] [t]his is not a new evaluation.

Tr. 69:4–9. Accordingly, the Court rejects the government's assertion that "[RM] played no role in the second evaluation"; indeed, the only way this assertion is possibly true is if the phrase "second evaluation" is read exceedingly narrowly to mean just the sign-off on the final revised SSEB recommendation.[26] Def. Reply at 7. But even if that were a reasonable way to characterize what happened, it would not excuse the Agency's failure to include the RM termination letter in the administrative record.

***18** In sum, the Court concludes that the RM termination letter "was a relevant document to the matter" and that both Oak Grove and the Court were harmed by the Agency's failure to include it in the initial record. Tr. 49:5–8 ("But at the end of the day, [RM] was removed. Everybody in this process knew it and they kept it from [plaintiff's counsel], they kept it from GAO, they kept it from this Court."). At a minimum, the Agency's failure to include the RM termination letter in the administrative record — when combined with various assertions in the briefs and other documents in the record — had the effect of concealing RM's true role in the procurement and the precise nature of the corrective action. *Cf. Antonious v. Spalding & Evenflo Cos., Inc.*, 275 F.3d 1066, 1075 (Fed. Cir. 2002) ("Advancing even a single invalid theory forces the defendant to respond and to do work it should not have been required to do."). There is no question that, without the RM termination letter, the Court would not have the clear picture it now has regarding the true nature of the corrective action.

VII. CONCLUSION

For all the above reasons, and pursuant to RCFC 11, the Court concludes that the United States must pay the legal costs and expenses Oak Grove incurred in dealing with the administrative record issues that were the subject of the Court's show cause order. The Agency's failure to include the omitted documents was neither reasonable nor excusable — it was, rather, an improper compilation, submission, and

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certification of the administrative record. The omissions delayed resolving this case, wasted the Court's judicial resources by forcing the Court to engage in fact finding on an incomplete record, and imposed substantial costs on Oak Grove.

Counsel for Oak Grove and the government are directed to meet-and-confer in good faith regarding those costs and submit a joint status report on or before November 19, 2021, indicating whether they have reached an agreement on a fair and reasonable sum, or detailing their respective positions if the parties are unable to reach an agreement. A fair and reasonable sum will include costs incurred in reviewing, responding to, preparing for, or participating in (as applicable): (1) the supplemental administrative record filings (made after the merits briefing and following oral argument); (2) related orders of this Court; (3) related supplemental briefs; and (4) related status conferences and the show cause hearing.

IT IS SO ORDERED.

All Citations

--- Fed.Cl. ----, 2021 WL 5114707

Footnotes

* On October 29, 2021, the Court filed, under seal, this opinion and order and provided the parties the opportunity to propose redactions. On November 3, 2021, the parties filed agreed-upon proposed redactions, ECF No. 91, which are incorporated, in full, in this public version of this opinion and order.

1 The Court's published decision redacted the name of that Agency employee, referred to as "RM."

2 In *Gallup*, the agency committed, specifically, that it would "issue guidance to its contracting staff emphasizing the importance of completeness, accuracy, and integrity in preparing records and accompanying certifications [and] is in the process of planning a training session ... that will focus on issues of accuracy and ethics in preparing and certifying administrative records." 131 Fed. Cl. at 547 (quoting Dkt. No. 28, at 1–2).

3 *See, e.g.*, *Nat'l Urb. League v. Ross,* 2020 WL 5548117, at *5 (N.D. Cal. Sept. 15, 2020) (citing cases for the proposition that "failure to produce or complete an administrative record can be the basis for sanctions"); *New York v. Dep't of Com.*, 461 F. Supp. 3d 80, 94 (S.D.N.Y. 2020) (ordering government "to reimburse the NGO Plaintiffs for the expenses, including attorney's fees and costs, they reasonably incurred in addressing Defendants' production failures" with respect to an administrative record).

4 "In imposing Rule 11 sanctions, a court may allocate sanctions between an attorney and client according to their relative fault." *Judin v. United States*, 110 F.3d 780, 785 (Fed. Cir. 1997). While "[a]ttorneys are usually held solely responsible for Rule 11 sanctions when the filing violating Rule 11 is unwarranted by existing law, or a good faith argument for extension, modification, or reversal of existing law[,] ... an attorney and client may be held jointly and severally liable for filings that are not well grounded in fact." *Id.* (citing *Allen v. Utley,* 129 F.R.D. 1, 9 (D.D.C. 1990)); *see also, e.g.*, *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 550, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991) ("Where a represented party appends its signature to a document that a reasonable inquiry into the facts would have revealed to be without merit, we see no reason why a district court should be powerless to sanction the party in addition to, or instead of, the attorney."); *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1205 n.7 (Fed. Cir. 2005) (citing *Bus. Guides, Inc.*, 498 U.S. at 550, 111 S.Ct. 922, for the proposition that a "party who signs a document in violation of Rule 11 may be sanctioned").

5 The Federal Circuit in *Antonious* described the standard under Rule 11 of the Federal Rules of Civil Procedure, which is identical to RCFC 11. *See* 275 F.3d at 1071; Fed. R. Civ. P. 11.

6 Again, the Court accepts without hesitation that the government's counsel of record "was not aware of the two documents that are the subject of the show cause order." Def. Resp. at 3. Nevertheless, as discussed *infra*, that does not excuse the Agency's failures here.

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7 "[W]hat constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion or other paper; whether the pleading, motion or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar." Fed. R. Civ. P. 11 Advisory Committee Notes (1983 Amendment).

8 *See also* J. Goldfrank, Guidance to Client Agencies on Compiling the Administrative Record, 48 U.S. Att'ys' Bulletin 7 (Feb. 2000), https://www.justice.gov/sites/default/files/usao/legacy/2006/06/30/usab4801.pdf.

9 *See also* U.S. Army Judge Advocate General's Legal Center & School, Dep't of the Army, Federal Litigation Deskbook 2016 G-39 (instructing that "[t]he agency should include all materials that might have influenced its decision, not just the documents upon which it relied" and that "[a]n agency may not exclude from the administrative record documents that reflect pertinent but unfavorable information" (citing cases)).

10 *See also United Farm Workers v. Adm'r, U.S. EPA*, 2008 WL 3929140, at *2 (N.D. Cal. Aug. 26, 2008) (citing U.S. Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record (Jan. 1999) and ultimately holding that "the 'whole record' subject to review under the [Administrative Procedure Act ("APA")] is not merely the record designated and submitted by the agency" (quoting *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993))); *see also In re United States*, 875 F.3d. 1200, 1208 (9th Cir. 2017) (relying upon the Justice Department guidance document), *vacated on other grounds by In re United States*, —— U.S. ——, 138 S. Ct. 443, 445, 199 L.Ed.2d 351 (2017). In *In re United States*, the Supreme Court remanded the case, requiring the lower courts to resolve "threshold arguments" before addressing the administrative record; it left to the district court the discretion to compel document disclosures after giving the government an opportunity to argue the issue. 138 S. Ct. at 445.

11 *See also Christine Asia Co., Ltd. v. Alibaba Grp. Holding Ltd.*, 327 F.R.D. 52, 54 (S.D.N.Y. 2018) ("The weight of authority in this Circuit goes against allowing a party to redact information from admittedly responsive and relevant documents 'based on that party's unilateral determinations of relevancy.' " (quoting *Cyris Jewels v. Casner*, 2016 WL 2962203, at *4 (E.D.N.Y. May 20, 2016))); *Polk v. Swift*, —— F.R.D. ——, ——, 2021 WL 2941994, at *2 (D. Wyo. Jan. 22, 2021) (noting that even "[a]fter the 2015 amendments to Rule 26, ... "[r]elevance is to be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to the other matter that could bear on any party's claim or defense.' " (quoting *State Farm Mut. Auto. Ins. Co. v. Fayda*, 2015 WL 7871037 at *2 (S.D.N.Y. Dec. 3, 2015), *aff'd*, 2016 WL 4530890 (S.D.N.Y. Mar. 24, 2016))).

12 *Available at* https://www.acus.gov/publication/agency-practices-and-judicial-review-administrative-records-informal-rulemaking-report.

13 *See Oak Grove*, —— Fed.Cl. at —— n.13, 2021 WL 3627111 at *12 n.13 (explaining that "there is a distinction between the GAO's record production requirements and the Court's Rules governing the filing of the administrative record").

14 *Axiom* does not conflict with this Court's earlier observation that an agency's compilation of the administrative record is subject to the Court's review: "Effective judicial review of an agency's exercise of discretion is irreconcilably at odds with the notion that the reviewing court's inquiry must be confined to an administrative record that is likewise the product of the agency's sole discretion." *Pikes Peak Fam. Hous., LLC v. United States*, 40 Fed. Cl. 673, 676–77 (1998); *see also* ACUS Report at 66, 69 (noting that "the agency does not unilaterally determine what constitutes the administrative record" and warning that "the risk of incompleteness may rise with delayed compilation of an administrative record").

15 Redactions here would have been entirely inappropriate; *a fortiori*, withholding entire documents is no better. *See Doe v. Trump*, 329 F.R.D. 262, 276 (W.D. Wash. 2018) ("[T]he court concludes that 'the better ... approach is to not provide litigants with the *carte blanche* right to willy-nilly redact information from otherwise responsive documents in the absence of privilege, merely because the producing party concludes on its own that some words, phrases, or paragraphs are somehow not relevant.' " (quoting *Bonnell v. Carnival Corp.*, 2014 WL 10979823, at *4 (S.D. Fla., Jan. 31, 2014))).

16 A solicitation's evaluation factors are generally contained within an RFP's Section M. *See* AR 1709 (RFP § M.4 ("Factors"), RFP § M.4.1 ("Factor 1 – Capability Evaluation Approach")); AR 1712 (RFP § M.4.2 ("Factor

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2: Past Performance Evaluation Approach")); AR 1713 (RFP § M.4.3 ("Factor 3 – Cost/Price Evaluation Approach")).

17 As the Court previously noted, the RM termination was added to the AR *"without any explanation for its original omission ...."* *Oak Grove*, —— Fed.Cl. at ——, 2021 WL 3627111, at *10.

18 *Cf. MVS USA, Inc. v. United States*, 111 Fed. Cl. 639, 643 n.4 (2013) (noting that the "government provided the MOA after completion of briefing, ostensibly to address questions that had arisen in the briefing on the dispositive motions," but overruling "the government's objections to its inclusion" in the administrative record); *Inst. for Fisheries Res. v. Burwell*, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017) ("It is obvious that in many cases internal comments, draft reports, inter– or intra-agency emails, revisions, memoranda, or meeting notes will inform an agency's final decision. Therefore, the government is wrong to assert that these types of materials, as a categorical matter, should be excluded from the universe of materials 'directly or indirectly considered by agency decision-makers.' Of course, these types of materials could be protected from disclosure by the deliberative process privilege. But the scope of the privilege doesn't define the scope of the material directly or indirectly considered. If a privilege applies, the proper strategy isn't pretending the protected material wasn't considered, but withholding or redacting the protected material and then logging the privilege." (citations omitted)).

19 Mr. [DW] likely misspoke as the record indicates he was appointed SSEB Chairperson on May 4, 2020 ("source selection chair" is not referenced). AR 5390.

20 To be clear, the Court reaches no conclusion on the substance of RM's conduct. Again, the Court's point is simply that APA review requires the agency to file "the whole record" and that Oak Grove was deprived of the opportunity to make arguments based upon the missing document. 5 U.S.C. § 706 ("the court shall review the whole record").

21 The Court does not hold that a plaintiff-protester is never responsible for finding such needles in a voluminous administrative record. Nor does the Court attempt here to define in all circumstances when a plaintiff has sufficient notice of the existence (or likely existence) of documents such that the plaintiff must raise the issue in a timely manner with the government or the Court. Instead, as explained in this section of this order, the Court finds only that under the facts of this case — including, but not limited to, the virtually camouflaged location of the information at issue — neither the Court nor Oak Grove were on notice of RM's true role in the procurement at issue.

22 *See Oak Grove*, —— Fed.Cl. at ——, 2021 WL 3627111, at *29 (noting that the "[termination] document – produced way too late in the day for this litigation – certainly casts a long shadow over [RM's] conduct in his role as SSEB Chair during this procurement, lends more than a modicum of support to the allegations of [misconduct by] F3EA's former employees, and was not addressed by either the PCO's investigation memoranda or counsel of record in this case").

23 *See, e.g.*, *Orbis Sibro, Inc.*, B-418165.7, 2021 WL 1750369, at *3–4 (Comp. Gen. Apr. 12, 2021) (noting agency's explanation "that, *in order to ensure a proper and thorough evaluation*, the reevaluation did not rely on the previous evaluation but was performed anew" to include not only "a complete reevaluation of all proposals," but also "a new tradeoff analysis, and a new selection decision by a new source selection team" (emphasis added)).

24 The government (*see* Def. Reply at 4) mistakenly cites AR 3349–50, which is the Source Selection Decision Document, not the referenced SSAC Chairperson's Memorandum.

25 Similarly, the Court notes that in the Agency's GAO brief in the protest proceedings following the putative corrective action, the Agency represented that it "re-evaluated proposals as part of the corrective action consistent with the evaluation criteria set forth in the Solicitation *and* arranged for an independent review of the evaluation." AR 975 (emphasis added). The Agency's representation to the GAO concerning the nature of the corrective action would lead an uninformed reader to believe that there were two steps to the corrective action: (1) a reevaluation of proposals; *and* (2) an independent review of that evaluation. In fact, however, it turns out that the "independent review" *was* the reevaluation.

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26 The government points to AR 3530 for the proposition that the "existing AR plainly showed" that "[RM] had no involvement in the August 2020 re-evaluation and award." Def. Reply at 7 (citing AR 3530, AR 3885–86). But AR 3530 is a declaration (made under penalty of perjury) from RM's second-line supervisor, submitted to the GAO, representing that she "saw no indications that [RM] acted improperly during the source selection process" but that "for un-related reasons, [she] had another Government employee conduct an independent evaluation of the proposals for [the procurement] which resulted in the updated Proposal Evaluation Report." AR 3530. The supervisor's declaration omits that RM was removed from his position as SSEB Chairperson, omits that he played a role in the corrective action process (whatever that entailed), and certainly would lead a reader to believe that there was an entirely new "evaluation of the proposals" — something that did not happen. As Mr. [DW] made clear, his "independent" review did not consist of a wholesale reevaluation, but rather was focused on the quality of the PER to ensure it aligned with the extant evaluations performed by evaluators — former SSEB members — that were not reconvened because they were no longer available. The other cited document is the second award notification letter to Oak Grove, *see* AR 3884–3886. It, too, does not disclose anything about the mechanics of the supposed reevaluation or RM's involvement in the putative corrective action. With the benefit of the RM termination letter, we now know that when the government told Oak Grove that "the Government conducted an independent review of the individual evaluations to ensure that all of the evaluations and findings were assessed in accordance with the solicitation procedures," that did *not* mean the Agency had performed a reevaluation. AR 3885.

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B- 418427.6 (Comp.Gen.), B- 418427.10, 2021 CPD P 8, 2020 WL 8257984

COMPTROLLER GENERAL

Matter of: Oak Grove Technologies, LLC

DOCUMENT FOR PUBLIC RELEASE The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

December 18, 2020

***1** Craig A. Holman, Esq., and Thomas A. Pettit, Esq., Arnold & Porter Kaye Scholer, LLP, for the protester. Joshua A. Mullen, Esq., Darwin A. Hindman, III, Esq., and Rachel C. Haley, Esq., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, for F3EA, Inc., for the intervenor. Jonathan A. Hardage, Esq., and Andrea K. R–Ferrulli, Esq., Department of the Army, for the agency.

Lois Hanshaw, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's rejection of the protester's proposal as technically unacceptable is denied where the proposal failed to meet a material solicitation requirement.

DECISION

Oak Grove Technologies, LLC (Oak Grove), a service-disabled veteran-owned small business (SDVOSB) of Raleigh, North Carolina, protests the award of a contract to F3EA, Inc., an SDVOSB of Savannah, Georgia, under request for proposals (RFP) No. W900KK–19–R–0078, issued by the Department of the Army, U.S. Army Materiel Command, for training support services. Oak Grove challenges the agency's evaluation of proposals, alleges a violation of the Procurement Integrity Act (PIA), and contends that the awardee had an organizational conflict of interest (OCI).

We deny the protest

BACKGROUND

On October 30, 2018, the agency issued the solicitation as a set-aside for SDVOSBs pursuant to Federal Acquisition Regulation (FAR) part 15, Contracting by Negotiation. Agency Report (AR), Tab 3, RFP at 2, 58. The RFP contemplated the award of an indefinite-delivery, indefinite-quantity (IDIQ) contract with an ordering ceiling of $245,000,000. *Id.* at 2.

The RFP sought proposals for training support services in support of the Special Operations Forces Requirements Analysis, Prototyping, Training, Operations and Rehearsal (SOF RAPTOR) IV requirement. AR, Tab 4, Performance Work Statement (PWS) at 3. The SOF RAPTOR IV contract would provide special operations forces (SOF) training for counter terrorism, counter narco-terrorism, counter proliferation and unconventional warfare missions using a mix of live, virtual, and constructive simulation scenarios. [1] *Id.*

Award would be made on a best-value tradeoff basis, considering three evaluation factors, listed in descending order of importance, capability, past performance, and cost/price. RFP at 58–59. The capability factor consisted of three subfactors, listed in descending order of importance, program management, crisis response force (CRF), and core competencies. [2] *Id.* at 59.

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The program management subfactor required offerors to address four areas, including, as relevant here, exercise management, which required an offeror to demonstrate a thorough understanding of complex pre-exercise coordination and post-exercise activities. *Id.* In this regard, offerors were required to provide a realistic military training (RMT) packet and an after action review (AAR) for a previously executed exercise.[3] *Id.* The solicitation required that the RMT packet and AAR be from the same exercise. *Id.* at 47.

***2** The solicitation advised that to be considered for award, proposals must receive a rating of no less than acceptable for the capability factor. *Id.* at 59. An evaluation rating of unacceptable for any subfactor under the capability factor would result in the entire factor being found unacceptable.[4] *Id.* The RFP also stated that clarity and completeness of the proposal was of the utmost importance. *Id.* at 43. Further, the RFP warned that proposal volumes must be internally consistent or the proposal could be considered unacceptable. *Id.*

By the December 14 due date, 10 offerors submitted proposals, including Oak Grove, F3EA, and Offeror H. On January 15, 2020, the agency made award to F3EA. Joint Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 20. Five unsuccessful offerors subsequently protested the award with our Office. *Id.* On January 31, the agency notified our Office that it intended to take corrective action in response to the protests.[5] *Id.* GAO subsequently dismissed these protests as academic. After completing its corrective action, final ratings were as follows:

	F3EA	**Offeror H**	**Oak Grove**
Capability	Outstanding	Good	Unacceptable
Program Management	Outstanding	Good	Unacceptable
CRF	Outstanding	Acceptable	Marginal
Core Competencies	Outstanding	Good	Marginal
Past Performance	Very Relevant/ Substantial Confidence	Relevant/Satisfactory Confidence	Very Relevant/ Substantial Confidence
Cost/Price	$4,347,814	$4,727,661	$3,568,354

***3** AR, Tab 33, Source Selection Decision Document (SSDD) at 6.

The agency assigned a deficiency to Oak Grove's proposal under the program management subfactor and rated this subfactor and the capability factor as unacceptable. AR, Tab 19, Oak Grove Capability Factor Proposal Evaluation Report (PER) at 3. As relevant here, the protester offered an RMT packet developed for an exercise known as Robin Sage.[6] AR, Tab 17, Oak Grove Capability Factor Proposal at 88. The agency concluded that the RMT packet and AAR included in Oak Grove's proposal were not from the same exercise because the exercise dates identified in the RMT packet-December 7, 2018 to September 12, 2019-occurred after the AAR identified as "'ROBIN SAGE Class 06–18,' which occurred [between] 1–27 Oct 2018." AR, Tab 19, Oak Grove Capability Factor PERat 11. The agency first noted that by regulation, the RMT should have preceded the AAR. *Id.* The agency also cited multiple documents contained in Oak Grove's proposal that identified exercise dates that were not only internally inconsistent, but also occurred before the exercise dates identified in the RMT package. *Id.*

On August 31, the agency again made award to F3EA. After requesting and receiving a debriefing, Oak Grove timely filed this protest with our Office.

DISCUSSION

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Oak Grove challenges the agency's evaluation of its proposal and the awardee's. Protest at 43–62; 63–74. The protester also asserts that the agency violated the PIA and that the awardee's work on the Raptor III IDIQ contract created an immitigable OCI. [7] Protest at 31–37.

As discussed below, we have reviewed the protester's allegations and conclude that the agency reasonably evaluated the protester's proposal as technically unacceptable under the program management subfactor of the capability factor, and therefore, ineligible for award. [8] Because we conclude that the agency reasonably found the protester's proposal unawardable, we need not address the protester's remaining challenges as it is not an interested party to raise them. *The McHenry Mgmt. Grp., Inc.,* B–409128 *et al.,* Jan. 23, 2014, 2014 CPD ¶56 at 5 (where a protester's proposal is reasonably found unacceptable, it is not an interested party to challenge the evaluation of the remainder of its proposal); *Tyonek Worldwide Servs., Inc.; DigiFlight, Inc.,* B–409326 *et al.,* Mar. 11, 2014, 2014 CPD ¶97 at 7 (where another acceptable proposal is eligible for award, a protester is not an interested party to challenge the award where it would not be in line for award were its protest sustained); *Arc Aspicio, LLC et al.,* B–412612 *et al.,* Apr. 11, 2016, 2016 CPD ¶117 at 12–13 (where we find that the protester could not be in line for award, we will not address the protester's allegation that the award is tainted by an OCI).

***4** Where a protester challenges an agency's evaluation of proposals, our Office will not reevaluate proposals; rather, we examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. *See Mercom, Inc.,* B–413419, B–413419.2, Oct. 25, 2016, 2016 CPD ¶316 at 3. It is an offeror's responsibility to submit a well-written proposal, with adequately detailed information that clearly demonstrates compliance with the solicitation and allows a meaningful review by the procuring agency. *ACC Constr.-McKnight Joint Venture, LLC,* B–411073, Apr. 30, 2015, 2015 CPD ¶147 at 5.

The protester challenges the deficiency assessed under the program management subfactor of the capability factor. Protest at 40. The protester asserts that each annual Robin Sage cycle constitutes an exercise that includes specific classes that relate to individual trainings. *Id.* Additionally, the protester explains that an exercise would include multiple classes that all fell within the same fiscal year exercise. *Id.* at 62. In this regard, the protester asserts that its RMT packet covered the Robin Sage exercise for fiscal year 2019, which ran from October 1, 2018, to September 30, 2019, and included Classes 05–18 and 06–18. *Id.* at 40. According to the protester, Class 05–18 was associated with exercise dates of August 3 to August 17, 2018, while Class 06–18 was associated with exercise dates of September 29 to October 11, 2018. *Id.* at 40 (citing AR, Tab 17, Oak Grove Capability Factor Proposal at 161, 163). Thus, according to the protester, the agency erred in concluded that the various classes identified in the RMT and AAR did not all relate to the same fiscal year exercise. *Id.* at 41.

The agency responds by clarifying that the RMT packet in Oak Grove's proposal included a letter that identified the exercise dates for fiscal year 2019 as December 7, 2018, to September 12, 2019. COS/MOL at 40. The agency also explains that it properly concluded that Oak Grove's proposal did not demonstrate a thorough understanding of the complex pre-exercise and post-exercise activities because the AAR, dated October 2018, improperly preceded the fiscal year 2019 exercise dates. *Id.* (citing AR, Tab 19, Oak Grove Capability Factor PER at 11). The agency contends that this inconsistency as well as the protester's inclusion of other classes outside the fiscal year 2019 exercise dates identified in the protester's RMT packet caused the agency to conclude that the RMT and AAR were not from the same exercise. *Id.*

Here, the RFP required an offeror to demonstrate a thorough understanding of complex pre-exercise coordination and post-exercise activities. RFP at 47. In this regard, pre-exercise coordination was associated with the RMT packet, while post-exercise activities were associated with an AAR. AR, Tab 4, PWS at 8. As noted above, the RFP also advised that proposals must be clear, complete, and internally consistent. RFPat 43.

***5** The record shows that the protester's RMT packet included a letter indicating that the fiscal year 2019 exercise dates ran from December 7, 2018, to September 12, 2019. AR, Tab 17, Oak Grove Capability Factor Proposal at 123. More specifically, in the protester's proposal, the classes associated with the fiscal year 2019 exercise were: Class 01–19, Class 02–19, Class 03–

19, Class 04–19, and Class 05–19. [9] *Id.* at 124. Additionally, the proposal included an AAR dated October 1 to October 27, 2018, nearly three months prior to the fiscal year 2019 exercise dates in the protester's RMT packet; the title of the AAR, Class 06–18, applied to an earlier fiscal year's exercise. *Id.* at 89. Class 06–18 was associated with exercise dates of September 29 to October 11, 2018. *Id.* at 161.

We find no basis to question the agency's conclusion that the RMT packet and AAR were not from the same exercise. At the outset, we note that the protester's explanation regarding the interplay between classes and fiscal year exercises is not included in its proposal. Here, despite the requirement that the RMT address pre-exercise activities and the AAR address post-exercise activities, Oak Grove's proposal offered an AAR dated nearly three months prior to the exercise dates identified in its RMT packet. *Id.* at 89, 123. Similarly, the Class 06–18 AAR is not related to the classes identified for fiscal year 2019. *Id.* at 124. In our view, the agency reasonably concluded that classes and exercise dates outside the classes and exercise dates identified for fiscal year 2019 related to a different Robin Sage exercise cycle. [10] That is, the agency's conclusion is consistent not only with the dates identified in the protester's proposal, [11] but also with the protester's contention that an exercise would include only classes that fell within fiscal year 2019.

We also find reasonable the agency's conclusion that the RMT contained internal inconsistencies. The agency notes, and we agree, that the record shows that the classes and exercise dates identified in Oak Grove's proposal did not all fall within the fiscal year 2019 Robin Sage exercise identified in the protester's RMT packet. *See* COS/MOL at 41. In short, the record shows that Oak Grove's proposal included inconsistent information regarding training exercise dates. For example, the proposal included letters that identified training dates for exercises that were held in 2018, between August 3 and August 17, and between September 29 and October 11-approximately two to four months before the fiscal year 2019 exercise dates. AR, Tab 17, Oak Grove Capability Factor Proposal at 161, 163.

As another example, the proposal included information on student performance data from Class 02–17, which is also outside of the classes identified for fiscal year 2019. *Id.* at 104. The protester's disagreement with the agency's conclusions, without more, does not show that the agency's conclusions were unreasonable. *RIVA Sols., Inc.,* B–418408, Mar. 31, 2020, 2020 CPD ¶133 at 4. Additionally, where, as here, an offeror fails to submit a well-written proposal, it runs the risk that a procuring agency will evaluate its proposal unfavorably. *ACC Constr.-McKnight Joint Venture, LLC, supra.* On these facts, we find no basis to sustain the protest.

***6** Based on our review of the record, we conclude that the agency reasonably assessed a deficiency under the program management subfactor. Because the RFP stated that a proposal with one or more deficiencies would be rated unacceptable, and unawardable, RFP at 65, we need not address the remainder of the protester's arguments. *The McHenry Mgmt. Grp., Inc., supra; Tyonek Worldwide Servs., Inc.; DigiFlight, Inc., supra; Arc Aspicio, LLC et al., supra.*

The protest is denied.

Thomas H. Armstrong
General Counsel

Footnotes

1 The SOF RAPTOR IV contract would be a new effort that continued training support currently provided by the SOF RAPTOR III contract. AR, Tab 4, PWS at 3.

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2 The RFP required offerors to address four sample tasks critical to the adaptability and responsiveness necessary to execute SOF training requirements. RFP at 47. The offerors would address the sample tasks through four sample task order (STO) PWSs. *Id.* at 48–50. Three of the four STO PWSs stated that the PWSs were formed from a statement of work from SOF RAPTOR III. AR, Tab 10a, PWS STO CRF at 3; AR, Tab 10b, PWS STO Unconventional Warfare Exercise at 3; AR, Tab 10c, PWS STO Special Activities Exercise at 3.

3 The PWS stated that a contractor must be capable of managing complex training exercises, including pre-exercise coordination (*e.g.,* RMT packet) and post-exercise activities (*e.g.,* AAR). AR, Tab 4, PWS at 8.

4 A rating of unacceptable would be assigned to a proposal that failed to meet solicitation requirements and contained one or more deficiencies. RFP at 65. Such a proposal would be considered unawardable. *Id.*

5 The agency stated that it would take corrective action by reevaluating proposals consistent with the solicitation, determining the impact of the reevaluations on the source selection decision, documenting its reevaluations and new best-value determination, and taking whatever additional steps it deems appropriate. *Patriot Def. Grp., LLC,* B–418427, Feb. 5, 2020 (unpublished decision); *Black Talon Operational & Eng'g Servs., LLC,* B–418427.2, Feb. 5, 2020 (unpublished decision); *ITility, LLC,* B–418427.3, Feb. 5, 2020 (unpublished decision); *Oak Grove Techs., LLC,* B–418427.4, Feb. 5, 2020 (unpublished decision); *Lukos–VATC JV III, LLC,* B–418427.5, Feb. 5, 2020 (unpublished decision).

6 Oak Grove states that the Robin Sage exercise trains and prepares special forces students to succeed in combat operations. Protest at 40; AR, Tab 17, Oak Grove Capability Factor Proposal at 123.

7 The protester also challenged the agency's conduct of discussions, but withdrew this allegation in its comments. Protest at 38–39; Comments and Supp. Protest at 22 n.5.

8 In addition, we dismiss Oak Grove's allegations that the agency committed violations of the PIA. The procurement integrity provisions of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. §§ 2101–2107, known as the PIA, provide that a federal government official "shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." 41 U.S.C. § 2102(a)(1). Here, the protester contends that a government official intentionally attempted to steer award of the RAPTOR IV contract to the awardee by basing RAPTOR IV STOs (sample task orders on PWSs (performance work statements) that were allegedly written by F3EA under the RAPTOR III contract. Protest at 31. Oak Grove also asserts that this same official crafted subject matter expert (SME) position descriptions and qualifications to favor the awardee. *Id.* at 32. The protester's arguments do not establish that the prerequisite elements of a PIA violation are present, *i.e.,* the knowing disclosure of either contractor bid or proposal information or source selection information. *AlliantCorps, LLC,* B–415744.2, Apr. 4, 2018, 2018 CPD ¶136 at 4. In this regard, the protester does not explain how a STO PWS or SME position description under the current or prior RAPTOR IDIQ contracts falls within the definition of either bid or proposal information or source selection information. *See* 41 U.S.C. § 2101(2), (7). Accordingly, because Oak Grove's allegations do not describe violations of the PIA, we find that these arguments fail to state a valid basis of protest and dismiss the allegations accordingly. *See* 4 C.F.R. § 21.5(f); *Lion Vallen, Inc.,* B–418503, B–418503.2, May 29, 2020, 2020 CPD ¶183 at 15 n.6.

9 The dates associated with each fiscal year 2019 class were as follows: Class 01–19 (Dec. 7 to Dec. 20, 2018); Class 02–19 (Mar. 8 to Mar. 21, 2019); Class 03–19 (Apr. 26 to May 9, 2019); Class 04–19 (June 28 to July 11, 2019); and Class 05–19 (Aug. 30 to Sept. 12, 2019). AR, Tab 17, Oak Grove Capability Factor Proposal at 123.

10 We also find unavailing the protester's assertion that the solicitation contained a latent ambiguity. In this regard, the protester asserts that the solicitation was ambiguous because the agency failed to recognize that each annual Robin Sage cycle was an exercise that could contain multiple training classes within the same Fiscal Year exercise. Protest at 62. As explained above, Oak Grove's own proposal identified classes that were outside the fiscal year 2019 RMT exercise dates.

11 To the extent the protester asserts that the fiscal year 2019 exercise began in October 2018, this assertion is not supported by its own proposal, which states that the exercise for fiscal year 2019 began in December 2018. *See* AR, Tab 17, Oak Grove Capability Factor Proposal at 123. In this regard, neither Class 05–18, nor Class 06–18 would fall within the fiscal year 2019 exercise.

B- 418427.6 (Comp.Gen.), B- 418427.10, 2021 CPD P 8, 2020 WL 8257984

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B- 418781.4 (Comp.Gen.), 2021 CPD P 252, 2021 WL 2805355

COMPTROLLER GENERAL

Matter of: People, Technology and Processes, LLC

July 2, 2021

***1** Victor L. Buonamia, for the protester.
Major Mark T. Robinson, and Major Aaron K. McCartney, Department of the Army, for the agency.

Raymond Richards, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST
Protest arguing that an agency's decision to reevaluate the quoted professional compensation pursuant to Federal Acquisition Regulation provision 52.222–46 is insufficient to remedy a previously protested failure to review the realism of prices is denied where the record shows that this decision is reasonable, consistent with the terms of the unique solicitation at issue, and the protester cannot claim to be competitively prejudiced by the agency's intended approach.

DECISION

People, Technology and Processes, LLC (PTP), a service-disabled veteran-owned small business of Tampa, Florida, protests the scope of the agency's corrective action taken following PTP's prior protest of the issuance of a task order under request for quotations (RFQ) No. W9124L20R0020. The task order was issued by the Department of the Army for personnel to instruct the joint fires observers (JFO) course at Fort Sill, Oklahoma. The protester argues that the agency's corrective action in response to a previous protest fails to include an evaluation of price realism and fails to resolve a latent ambiguity in the solicitation. [1]

We deny the protest.

BACKGROUND

The Army issued the RFQ through the General Services Administration's e-Buy system using the Federal Supply Schedule procedures of Federal Acquisition Regulation (FAR) subpart 8.4, and the commercial item procedures of FAR part 12. Agency Report (AR), Tab 2, Contracting Officer's Statement (COS) at 1; AR, Tab 5, Conformed RFQ at 1–2, 64. The RFQ anticipated the issuance of a fixed-price task order with a 1–year base period and one 1–year option period. Conformed RFQ at 43.

The RFQ sought quotations to provide 14 previously qualified terminal attack controller (PTAC) instructors to teach the resident and mobile training team JFO courses, based at Fort Sill. *Id.* at 43–44. Each course would consist of "80 clock hours of JFO instruction from the existing, current, or in revision JFO [plan of instruction] spread across 10 training days." *Id.* Vendors were instructed to prepare their quotations using a baseline of 1,920 labor hours per year so the agency would have a common basis for comparing the relative prices of quotations. *Id.* at 87. The solicitation established minimum instructor qualifications which included minimum experience requirements in specified occupations. *Id.* at 43–44.For example, the RFQ explained that all PTAC instructors shall possess the qualifications of, or have previously been, a joint terminal attack controller or an airborne forward air controller for at least three years. *Id.* at 44–45. The solicitation advised that the "full spectrum of training includes but is not limited to classroom, hands-on, simulation/virtual, field environment and exercises in a safe environment." *Id.* at 47.

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***2** The RFQ included only one evaluation factor, price, and stated that the Army would issue a task order to the vendor whose quotation would be most advantageous to the government considering price alone. *Id.* at 88.

The RFQ's anticipated evaluation of price read, in relevant part, as follows:

> The Government will evaluate [vendors'] prices for reasonableness using price analysis techniques. Prices evaluated as incomplete, unbalanced, unrealistically high or low ... inaccurate, or any combination thereof, may be grounds for eliminating a quote from further consideration. The Government will evaluate the price reasonableness of the [vendor's] quoted price and fee/profit. The Contracting Officer may consider comparing the prices received on quotes received, comparison of the proposed prices to historical prices paid, or comparing the prices received to the Independent Government cost estimate, or market research to evaluate reasonableness.

Id. at 89. Additionally, the RFQ contained FAR provision 52.222–46, Evaluation of Compensation for Professional Employees. *Id.* at 107–108.

The Army received four quotations in response to the RFQ. COS at 2. On February 11, 2021, the Army issued a task order to a vendor other than PTP. *Id.* at 3. Subsequently, PTP filed a protest with our Office, arguing that the Army's evaluation of quotations and source selection decision were unreasonable. *Id.;* Protest, attach. 5, Prior JFO Protest at 1–2. Specifically, PTP argued that the Army's evaluation of quotations was flawed because it did not include a price realism analysis, which PTP alleged was required by the solicitation. Protest, attach. 5, Prior JFO Protest at 2. In this regard, PTP argued that the RFQ's evaluation factor stated that quotations would be evaluated for unrealistically low pricing, and that the awardee's price was so low that it reflected a lack of understanding and would result in excessive personnel turnover. *Id.* at 10–12.

After the protest was filed, the Army filed a notice of corrective action, stating that it would reevaluate the price of all quotations received consistent with FAR provision 52.222–46, and make a new source selection decision based on the reevaluation. *People, Tech. & Processes, LLC,* B–418781.3, Apr. 2, 2021, at 1 (unpublished decision). Based on the Army's proposed corrective action, our Office dismissed the protest as academic. *Id.* at 2. On March 29, PTP filed the instant protest with our Office.

DISCUSSION

PTP argues that the solicitation here required an evaluation of price realism, and that the planned reevaluation anticipated by the agency in its decision to take corrective action is insufficient to comply with the RFQ's requirement. Protest at 1; Comments at 1, 3–8. In this regard, PTP argues that the agency's decision to evaluate only the proposed professional compensation pursuant to FAR provision 52.222–46 is inadequate because this evaluation is not the same as a price realism analysis conducted pursuant to FAR subsection 15.404–1(d)(3), which PTP asserts was required by the RFQ. *Id.* Essentially, the protester is challenging whether the Army's intended review will comply with the terms of the RFQ, arguing that the solicitation requires the Army to undertake a more robust analysis of price realism than what the agency has announced it will actually perform. The Army argues that the corrective action is reasonable, resolves any dispute regarding the terms of the solicitation, and that the protester has failed to demonstrate prejudice. Memorandum of Law (MOL) at 6–7, 11–13. For the reasons explained below, we deny the protest. [2]

***3** PTP argues that the RFQ demonstrates a concern about quality of service, recruitment and retention of personnel, and whether vendors have a clear understanding of the required work. Comments at 5. PTP argues that while the Army's corrective action will include an evaluation of quotations for price realism under FAR provision 52.222–46, the Army is not proposing to "conduct a full price and cost realism analysis with an assessment of risk" pursuant to FAR subsection 15.404–1(d)(3). *Id.*

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at 8. The Army argues that its decision to conduct only the realism analysis required by FAR provision 52.222–46, and not a separate, additional realism analysis, is reasonable and consistent with the terms of the solicitation. MOL at 6–8.

Contracting officers have broad **discretion** to take **corrective** **action** where the agency has determined that such action is necessary to ensure a fair and impartial competition. *NCS Techs., Inc.,* B–413500.2, Feb. 14, 2017, 2017 CPD ¶123 at 5. As a general matter, the details of **corrective** **action** are within the sound **discretion** of the contracting agency. *Id.*

For procurements contemplating fixed-price contracts (or orders), an agency may conduct a price realism analysis for the limited purpose of assessing whether a vendor's low price reflects a lack of technical understanding or risk, or assessing a vendor's responsibility. *See* FAR 15.404–1(d)(3). This analysis may only be conducted in a fixed-price environment when offerors have been advised that the agency will conduct such an analysis. *IR Techs.,* B–414430 *et al.,* June 6, 2017, 2017 CPD ¶162 at 7 (*citing American Access, Inc.,* B–414137, B–414137.2, Feb. 28, 2017, 2017 CPD ¶78 at 4–5). Absent a solicitation provision advising vendors that the agency intends to conduct a price realism analysis, agencies are neither required nor permitted to conduct such an analysis in issuing a fixed-price order. *See id.*

In PTP's prior protest, it argued that the agency's evaluation of quotations was unreasonable because the solicitation included a provision advising vendors that the agency intended to conduct a price realism analysis, however, the Army's evaluation did not include that analysis. Protest, attach. 5, Prior JFO Protest at 2–4. After reviewing the allegations raised in the prior protest, the agency determined that corrective action was necessary "in order to conduct a price realism analysis as required by FAR 52.222–46." COS at 4. The agency found that "a price realism analysis for professional compensation was indeed required by the solicitation[.]" *Id.* However, the Army argues that a price realism analysis conducted pursuant to FAR subsection 15.404–1(d)(3) was not required by the RFQ, therefore, the Army's corrective action-which will include a reevaluation of quotations pursuant to the terms of the RFQ as written-will include only a price realism analysis conducted pursuant to FAR provision 52.222–46. *See* MOL at 7–9.

***4** As explained above, the solicitation requested quotations for the services of 14 professional employees with specifically defined qualifications, and set a baseline of 1,920 labor hours per year. Conformed RFQ at 43–44. No technical quotations were requested. Quotations were to be based solely on the proposed price to supply 14 professional employees to teach the required JFO courses. [3] *See id.* at 86–89. As noted above, the solicitation advised that the agency would "evaluate [vendors'] prices for reasonableness using price analysis techniques. Prices evaluated as incomplete, unbalanced, unrealistically high or low ... inaccurate, or any combination thereof, may be grounds for eliminating a quote from further consideration." *Id.* at 89.

On the issue of whether the solicitation required a price realism analysis, we agree with PTP; the language of the RFQ clearly put vendors on notice that the agency would evaluate pricing, and that pricing found unrealistically low could result in a quotation's elimination from the competition. [4] Conformed RFQ at 89. This language therefore required the agency to conduct a price realism evaluation. *Esegur–Empresa de Seguranca, SA,* B–407947, B–407947.2, Apr. 26, 2013, 2013 CPD ¶109 at 4 (solicitation contemplated price realism evaluation where it notified offerors that unrealistically low prices may serve as a basis for rejection of a proposal).

Given that the solicitation required a price realism analysis generally, and given that the Army's proposed corrective action includes only the analysis conducted pursuant to FAR provision 52.222–46, we turn to the question of whether the Army's proposed corrective action is reasonable. For the reasons explained below, we answer this question in the affirmative and therefore deny the protest.

Here, the Army is buying only the services of 14 specifically defined professional employees. Technical quotations were not requested, and price was the only evaluation factor. We think that an analysis of the proposed professional compensation conducted pursuant to FAR provision 52.222–46, under the circumstances of this procurement, is sufficient to meet the price realism requirements of the solicitation. In this regard, the analysis required by FAR provision 52.222–46 will result in a realism review of the only thing required in these quotations-*i.e.,* the amount to be paid to these 14 professional employees.

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FAR provision 52.222–46 states in relevant part:

> The Government will evaluate [a vendor's total compensation plan] to assure that it reflects a sound management approach and understanding of the contract requirements. This evaluation will include an assessment of the offeror's ability to provide uninterrupted high-quality work. The professional compensation proposed will be considered in terms of its impact upon recruiting and retention, its realism, and its consistency with a total plan for compensation.
>
> * * * * *
>
> ***5** The compensation levels proposed should reflect a clear understanding of work to be performed and should indicate the capability of the proposed compensation structure to obtain and keep suitably qualified personnel to meet mission objectives.... [P]roposals envisioning compensation levels lower than those of predecessor contractors for the same work will be evaluated on the basis of maintaining program continuity, uninterrupted high-quality work, and availability of required competent professional service employees.
>
> * * * * *
>
> Professional compensation that is unrealistically low or not in reasonable relationship to the various job categories, since it may impair the contractor's ability to attract and retain competent professional service employees, may be viewed as evidence of failure to comprehend the complexity of the contract requirements.

FAR 52.222–46.

We conclude that the agency's decision to reevaluate all quotations consistent with FAR provision 52.222–46 and make a new award decision is reasonable given the unique terms of this solicitation. An evaluation under FAR provision 52.222–46 will assess vendors' understanding of the requirement, and will also consider whether the offeror can perform the requirements of the contract. FAR 52.222–46(a) ("This evaluation will include an assessment of the offeror's ability to provide uninterrupted, high-quality work."); (b) ("Offerors are cautioned that lowered compensation for essentially the same professional work may indicate lack of sound management judgment and lack of understanding of the requirement."); (d) ("Failure to comply with these provisions may constitute sufficient cause to justify rejection of a proposal.").

This essentially is the same analysis that the agency would conduct for a price realism evaluation pursuant to FAR subsection 15.404–1(d)(3) under the terms of the RFQ here. *See* FAR 15.404–1(d)(3) (price realism analysis on fixed-price contract assesses whether a vendor's low price reflects a lack of technical understanding). Further, this analysis will address the exact concerns expressed by the protester. Protest at 6 (arguing that PTP understood the solicitation "to require a price realism evaluation [] so that the Agency would be sure that the awardee understood the labor rates needed to recruit and retain highly trained personnel[.]"); Comments at 8 (arguing the agency's evaluation should ensure that vendors understand the work and must address concerns about "performance, recruiting and retention.").

Moreover, PTP has not explained what a price realism evaluation conducted pursuant to FAR subsection 15.404–1(d)(3) would review, under these RFQ terms, that is not already reviewed in an evaluation conducted pursuant to FAR provision 52.222–46. Therefore, PTP does not establish competitive prejudice. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. *CWTSatoTravel,* B–404479.2, Apr. 22, 2011, 2011 CPD ¶87 at 11–12. In the context of a protest challengingthe terms of a solicitation, competitive prejudice occurs where the challenged terms place the protester at a competitive disadvantage or otherwise affect the protester's ability to compete. *Id.; Onesimus Def., LLC,* B–411123.3, B–411123.4, July 24, 2015, 2015 CPD ¶224 at 6.

***6** We conclude that the agency's decision to conduct a price realism evaluation pursuant to FAR provision 52.222–46 will not put PTP at a competitive disadvantage. As PTP has not demonstrated that the intended evaluation here is inconsistent with

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the terms of the RFQ, and as the scope of the agency's corrective action will not result in any competitive prejudice to PTP, we deny this protest ground.

The protest is denied.

Thomas H. Armstrong
General Counsel

Footnotes

1 The protester here proceeded without legal counsel and no protective order was issued in this protest. The agency filed both a protected and redacted version of its report with our Office. Our discussion here references the redacted version of the report, when possible, and is necessarily general in nature in order to avoid reference to non-public information.

2 After the protest was filed, the Army requested dismissal, arguing the matter was premature at this juncture. Req. for Dismissal at 3. We declined the request because we think this protest is analogous to a challenge to the terms of a solicitation. *See Domain Name All. Registry,* B–310803.2, Aug. 18, 2008, 2008 CPD ¶168 at 7.

3 We note that the solicitation allowed vendors to choose whether or not to price a "phase-in" period. The phase-in period was encompassed within the 1–year base period, and allowed vendors to propose separate pricing for the time required to transition from task order issuance to full performance. Conformed RFQ at 43, 87. The phase-in period was set to run from March 1 to April 29, 2021; the full performance period of the base year was set to run from April 30, 2021, to February 28, 2022. *Id.* at 43. The RFQ advised that vendors quoting fewer hours during the phase-in period "shall reduce the total number of hours (*i.e.* 1,920 hours) to reflect the hours which will be invoiced" during the phase-in period. *Id.* at 87.

4 PTP also argues that the solicitation's sole evaluation factor was latently ambiguous. Protest at 3, 5–7; Comments at 8–11. The essence of this argument is that since the prior awardee submitted a lower-priced quotation than PTP, that vendor must have understood the solicitation as not requiring an evaluation of price realism.
It is well established that an ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. *See e.g., Red Heritage Med., Inc.*, B–418934, Oct. 19, 2020, 2020 CPD ¶348 at 2-3 (*citing Colt Def., LLC*, B–406696, July 24, 2012, 2012 CPD ¶302 at 8). Here, the language is not ambiguous because there is only one reasonable interpretation of the RFQ's sole evaluation factor. We conclude that the RFQ unambiguously notified vendors that quotations would be evaluated for price realism. Therefore, this ground of protest is denied.

B- 418781.4 (Comp.Gen.), 2021 CPD P 252, 2021 WL 2805355

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B- 419271.5 (Comp.Gen.), B- 419271.6, B- 419271.8, 2021 CPD P 191, 2021 WL 1923433

COMPTROLLER GENERAL
DOCUMENT FOR PUBLIC RELEASE The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

Matter of: Verizon Business Network Services, Inc.

April 26, 2021

***1** Jason A. Carey, Esq., Kayleigh Scalzo, Esq., Peter B. Terenzio III, Esq., and Sarah M. Shepson, Esq., Covington & Burling, LLP, for the protester.
Jonathan M. Baker, Esq., Christian N. Curran, Esq., Alexandra L. Barbee-Garrett, Esq., and Rina M. Gashaw, Esq., Crowell & Moring LLP, for AT&T Corp., an intervenor.
Peter G. Hartman, Esq., and Brian C. Habib, Esq., Department of Homeland Security, for the agency.

Louis A. Chiarella, Esq., Emily R. O'Hara, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the difference between the offerors' proposed prices shows that they were not competing on a common basis is denied where the protester does not identify any solicitation provisions which were vague or misleading.

2. Protest challenging the agency's evaluation of the protester's technical proposal is denied where the evaluation was without prejudice to the protester.

3. Protest alleging the agency engaged in inadequate discussions is denied where the agency's exchanges were meaningful, not misleading, and without prejudice to the protester.

4. Protest alleging that awardee was ineligible for award is dismissed as untimely where it fails to independently meet GAO timeliness requirements and represents an unwarranted piecemeal development and presentation of protest issues, which our Bid Protest Regulations do not contemplate.

DECISION

Verizon Business Network Services, Inc., of Ashburn, Virginia, protests the issuance of task orders to AT&T Corp., of Oakton, Virginia, under fair opportunity request for proposals (RFP) No. 70RTAC20R00000026, issued by the Department of Homeland Security (DHS) for DHS headquarters core data (HQCD) requirements. The protester contends the agency's evaluation of offerors' task order proposals and award decision were improper. [1]

We deny the protest.

BACKGROUND

DHS is in the process of modernizing its information technology services and capabilities, with the goal of "improve[ing] network and telecommunications service delivery across the Department. . . ." Agency Report (AR), Tab 7d, Statement of Work (SOW) at 13; *see* Contracting Officer's Statement (COS) at 1-2. To support its network transition, transformation, and modernization efforts, DHS developed the HQCD requirements SOW here. Specifically, "DHS seeks to acquire, or have the

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option to acquire in the future," the following: virtual private network service; ethernet transport service; optical wavelength service; private line service; internet protocol service; internet protocol voice service; managed network service; managed trusted internet protocol service; access arrangements; cable and wiring service; dark fiber service; a modernized software-defined wide area network (SD-WAN); a trusted internet connection and policy enforcement point; web conferencing service; and circuit switch voice service. SOW at 13.

***2** The RFP was issued on June 24, 2020, to holders of General Services Administration (GSA) Enterprise Infrastructure Solutions (EIS) governmentwide acquisition contracts, pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 16.5.[2] AR, Tab 7, RFP at 4.[3] The solicitation contemplated the issuance of four task orders, on fixed-price with economic price adjustment, and time-and-materials with economic price adjustment bases, for a base year with eleven 1-year options.[4] RFP at 9, 63. The RFP established that task order award would be made on a best-value tradeoff basis, based on three evaluation factors in descending order of importance: (1) performance management approach; (2) transition and modernization approach; and (3) price. *Id.* at 76-77. The non-price factors, when combined, were significantly more important than price. *Id.* at 77.

AT&T and Verizon were among the offerors that submitted task order proposals by the July 27 closing date. An agency technical evaluation team (TET) evaluated non-price proposals using an adjectival rating scheme to assess the level of confidence of successful performance: high confidence, some confidence, or low confidence. A separate price evaluation team (PET) evaluated price proposals, in accordance with the solicitation, for accuracy, completeness, and reasonableness. On September 28, after completing its evaluation, the agency selected AT&T for four task order awards. COS at 2.

On October 6, Verizon filed a protest with our Office challenging the evaluation and awards to AT&T. The agency thereafter informed our Office that it planned to take corrective action by terminating the task orders issued to AT&T, reevaluating proposals, and making a new award decision; DHS also reserved the right to conduct discussions with offerors as part of its corrective action. DHS Letter to GAO, B-419271.2, B-419271.3, Nov. 9, 2020. We then dismissed the earlier Verizon protest as academic. *Verizon Bus. Network Servs., Inc.*, B-419271.2, B-419271.3, Nov. 9, 2020 (unpublished decision).

On December 29, the agency completed its reevaluation, with the final evaluation ratings and prices of the AT&T and Verizon proposals as follows:

	AT&T	**Verizon**
Performance Management Approach	High Confidence	High Confidence
Transition and Modernization Approach	High Confidence	Some Confidence
Price	$306,183,079	$749,085,499

***3** AR, Tab 17, Source Selection Decision Document (SSDD) at 3.

The agency technical evaluators also made narrative findings--identified as elements that increased the confidence of success, or elements that decreased the confidence of success--in support of the assigned ratings. For example, with regard to the performance management approach factor, the TET identified three elements that increased confidence in AT&T's proposal, while finding two elements that increased confidence and one element that decreased confidence in Verizon's proposal. AR, Tab 14, TET Report at 6, 9.

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On December 29, the agency's source selection authority (SSA) received and reviewed the evaluation ratings and findings. AR, Tab 17, SSDD at 1-9. The SSA determined that AT&T's proposal was both higher-rated and lower-priced--by more than $442 million--than that of Verizon, and that AT&T represented the overall best value to the government. *Id.* at 10-11. On January 5, 2021, the agency issued the four task orders to AT&T. COS at 4. After requesting and receiving a debriefing, Verizon filed this protest with our Office on January 19. [5] *Id.*

DISCUSSION

Verizon raises a multitude of challenges regarding the agency's evaluation and resulting award decision. The protester asserts that, as evidenced by the differences in proposed pricing, offerors did not compete on a fair and equal basis. Verizon also contends the evaluation of technical proposals was unreasonable and unequal. Verizon also alleges the agency failed to hold meaningful discussions with it regarding its price and technical proposals. Lastly, Verizon alleges that AT&T is ineligible for award because AT&T does not offer SD-WAN services on its EIS contract, as required by the RFP here. Had the agency properly evaluated the proposals, Verizon argues, its proposal would have been selected for award. [6] Protest at 1-43; Comments & Supp. Protest at 1-40. Although we do not address all of the various issues and arguments raised by the protester, we have considered them all and find no basis on which to sustain the protest.

Price Evaluation/Common Basis for Competition

Verizon first alleges the agency's price evaluation was unreasonable. More specifically, the protester contends that offerors did not compete on a fair and equal basis, which "infected" the agency's price evaluation and resulting best-value decision. Comments & Supp. Protest at 16.

The RFP contemplated the issuance of task orders on a fixed-price (or a time-and-materials) basis, and provided offerors with detailed pricing worksheets to be used with their proposals. AR, Tab 7c, RFP attach. 1, Pricing Schedule. The record reflects that when completing the pricing worksheets, offerors often provided a price of "$0.00" for various CLINs. AR, Tab 15, PET Report at 3; COS at 13. As set forth above, Verizon's total evaluated price was $749,085,499, AT&T's evaluated price was $306,183,079, and the evaluated price for the third offeror (Offeror C) was $279,932,592. AR, Tab 15, PET Report at 8. The TET evaluated the prices in accordance with the solicitation and found them to be accurate, complete, and reasonable. *Id.* at 13-17.

***4** Verizon states that "[w]e are not suggesting that AT&T's or [Offeror C's] prices were unrealistically low: We are not claiming that AT&T or [Offeror C] cannot perform the work at their proposed prices, or that their proposed prices present too much risk." Comments & Supp. Protest at 23. Rather, Verizon argues, the offerors' "irreconcilable and erratic pricing" indicates that AT&T and Offeror C priced something very different than Verizon, which provided these other offerors with an unfair and unequal advantage. *Id.*

The agency states that "[a]ll offerors proposed prices using the same price workbooks and the same [RFP] requirements". Supp. Memorandum of Law (MOL) at 11-12. In the agency's view, the submitted prices were based on each offeror's independent business judgments regarding the discounts they elected to offer from their EIS contract pricing. *Id.* at 10.

It is a fundamental principle of government procurements that competitions must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals. *Booz Allen Hamilton, Inc.*, B-417418 *et al.*, July 3, 2019, 2019 CPD ¶ 246 at 6; *Continental RPVs*, B-292768.2, B-292768.3, Dec. 11, 2003, 2004 CPD ¶ 56 at 8. Additionally, the agency's description of its needs must be free from ambiguity and describe the agency's minimum needs accurately. *Arch Sys., LLC; KEN Consulting, Inc.*, B-415262, B-415262.2, Dec. 12, 2017, 2017 CPD ¶ 379 at 10; *Global Tech. Sys.*, B-411230.2, Sept. 9, 2015, 2015 CPD ¶ 335 at 17.

Although Verizon asserts the differences between prices show that offerors did not have a common understanding of the solicitation requirements, the protester does not identify any specific parts of the RFP which it asserts are vague, or ambiguous,

or that otherwise prevented offerors from competing on a common basis. [7] On this record we find no basis to conclude that the RFP failed to provide a common basis for offerors to compete or was otherwise defective. *See Arch Sys., LLC; KEN Consulting, Inc., supra* (finding alleged differences in price, alone, do not establish that offerors had differing understandings of a solicitation or that the solicitation failed to provide a common basis for competition); *Centerra Grp., LLC*, B-414768, B-414768.2, Sept. 11, 2017, 2017 CPD ¶ 284 at 6.

We also find Verizon's reliance on our decision in *Veterans Evaluation Services., Inc., et al.*, B-412940 *et al.*, July 13, 2016, 2016 CPD ¶ 185, to be inapt. In *Veterans Evaluation Services*, we found the agency's price evaluation to be unreasonable because the price evaluation methodology provided no insight to the agency regarding the likely cost to the government of awarding a contract to one firm versus another. *Id.* at 18. Here, by contrast, the agency's price evaluation as well as the underlying price evaluation methodology provides the agency with clear insight regarding the likely cost to the government of awarding a contract to one firm over another, which Verizon does not dispute.

***5** Finally, we find that which Verizon argues DHS failed to do--*i.e.*, reconcile offerors' divergent prices--was plainly not required as part of the RFP's price evaluation criterion and provides no basis on which to sustain the protest. *See Per Aarsleff A/S, et al.*, B-410782 *et al.*, Feb. 18, 2015, 2015 CPD ¶ 86 at 18. Quite simply, nothing required the agency to determine why Verizon's price was not as low as those of the other offerors.

Technical Evaluation of Verizon

Verizon also challenges the evaluation of its technical proposal. Specifically, Verizon alleges that various aspects of DHS's evaluation under the transition and modernization approach factor were unreasonable and unequal. Comments & Supp. Protest at 26-35. Had the agency performed a reasonable evaluation, Verizon argues, it would have received a "high confidence" rating for this evaluation factor, rather than a rating of "some confidence." Protest at 5.

As stated above, the task order competition here was conducted pursuant to FAR subpart 16.5. The evaluation of proposals in a task order competition is primarily a matter within the contracting agency's discretion, because the agency is responsible for defining its needs and the best method of accommodating them. *NCI Info. Sys., Inc.*, B-418977, Nov. 4, 2020, 2020 CPD ¶ 362 at 5; *Engility Corp.*, B-413120.3 *et al.*, Feb. 14, 2017, 2017 CPD ¶ 70 at 15. In reviewing protests of an award in a task order competition, we do not reevaluate proposals, but examine the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. *DynCorp Int'l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 7. A protester's disagreement with the agency's judgment regarding the evaluation of proposals or quotations, without more, is not sufficient to establish that an agency acted unreasonably. *Engility Corp., supra* at 16; *Imagine One Tech. & Mgmt., Ltd.*, B-412860.4, B-412860.5, Dec. 9, 2016, 2016 CPD ¶ 360 at 4-5. Our reviews indicates that the agency's technical evaluation of Verizon was both reasonable and without prejudice to the protester. *Synergy Sols. Inc.*, B-413974.3, June 15, 2017, 2017 CPD ¶ 332 at 12-13 (finding no prejudice associated with the challenged agency actions where the protester fails to demonstrate that, but for such actions, it would have had a substantial chance of receiving the award).

***6** With regard to the transition and modernization approach factor, the RFP established the agency would evaluate the extent to which proposals: (1) presented a clear understanding of the solicitation's transition and modernization requirements; (2) provided a clear explanation of the offeror's transition management approach; and (3) presented a modernization management approach "which represent[ed] short term modernization and beyond, inclusive of the ability to design, test and implement emerging technologies, . . . key resources and organization structure." RFP at 72.

The TET identified two elements in Verizon's transition and modernization approach that decreased performance confidence. [8] AR, Tab 14, TET Report at 9. First, the agency evaluators found that Verizon's proposal contained extensive discussion of managed network services (MNS) as part of its strategy (*e.g.*, "MNS service orders are present in multiple places in the transition schedule/approach"). *Id.* However, because DHS intended to order managed network services in limited circumstances, the

TET concluded that Verizon's emphasis on MNS demonstrated a lack of understanding of the agency's requirements. [9] *Id.* Additionally, the TET found that Verizon had proposed [DELETED] for SD-WAN deployment, but that the total time and method to complete SD-WAN deployment was left unclear. *Id.*

Verizon argues that its response to the RFP's MNS requirements was proper such that the identified shortcoming was in error (or alternatively, the agency's MNS requirements materially changed after RFP issuance). [10] Comments & Supp. Protest at 26-29, 34-35. Verizon also contends that the evaluation of its transition approach was unreasonable and unequal. *Id.* at 29-32. We need not decide the merits of Verizon's technical evaluation challenges, however, because Verizon fails to demonstrate that it was competitively prejudiced by the errors alleged.

Competitive prejudice is an essential element of a viable protest, and we will sustain a protest only where the protester demonstrates that, but for the agency's improper actions, it would have had a substantial chance of receiving the award. *Information Mgmt. Res., Inc.*, B-418848, Aug. 24, 2020, 2020 CPD ¶ 279 at 7 n.4. Where the record establishes no reasonable possibility of prejudice, we will not sustain a protest irrespective of whether a defect in the procurement is found. *Procentrix, Inc.*, B-414629, B-414629.2, Aug. 4, 2017, 2017 CPD ¶ 255 at 11-12.

The SSA, when making his source selection decision, found AT&T to be both higher technically-rated and lower-priced than Verizon. AR, Tab 17, SSDD at 10. The SSA also identified aspects of AT&T's proposal that evidenced AT&T's technical superiority to the other offerors:

***7** • AT&T was the sole offeror to [DELETED] per task order and to [DELETED], thereby ensuring service continuity at the task order level.

• AT&T was the sole offeror to propose to execute the transition, inclusive of all modernization objectives, in the initial 180 calendar day phase of its schedule.

• AT&T was the sole offeror to include a [DELETED] in the initial transition period.

• AT&T was the only offeror to correctly identify managed network services as mostly optional and to include these services in its proposal as a recommendation for future use by DHS.

• AT&T's proposal was superior to all other offerors with regard to the number of key personnel, transition schedule, and associated levels of modernization.

Id.

As a preliminary matter, Verizon challenges two aspects of the evaluation of its proposal under the transition and modernization approach factor; it does not dispute the remaining technical shortcomings identified by the evaluators. The record reflects, however, that the SSA did not rely upon Verizon's identified shortcomings when making the best-value determination. The SSA instead found that it was the many benefits associated with AT&T's proposal-- including those under the performance management approach factor (the most important of the evaluation criterion), which Verizon does not dispute--that made AT&T technically superior overall and the best value. *Engility Corp.*, *supra* at 17.

Moreover, even if Verizon were to receive a rating of "high confidence" under the transition and modernization approach factor, as the protester avers, such that the proposals from AT&T and Verizon were rated as equivalent under each non-price factor, Verizon's price would remain more than $442 million higher than AT&T's price--more than twice as high. We fail to see, and the protester has failed to demonstrate that, even if its technical evaluation challenges had merit, Verizon would either be higher rated than, or technically superior, to AT&T.

In sum, as AT&T's lower-priced proposal would remain in line for award ahead of Verizon's even if all of the protester's allegations concerning the technical evaluation were supported by the record, Verizon has failed to establish that it was prejudiced by the alleged technical evaluation errors. [11] *The MIL Corp.*, B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 14 (finding that no price/technical tradeoff was required as part of a best-value source selection when proposals are deemed technically equal and one was lower-priced than the other); *Orion Int'l Techs., Inc.*, B-293256, Feb. 18, 2004, 2004 CPD ¶ 118

at 3 (finding protester was not prejudiced by agency's alleged unequal evaluation of its proposal and the awardee's higher-rated proposal, where the awardee's proposal had a lower price and the protester does not assert that its proposal should be rated higher than the awardee's proposal).

Adequacy of Discussions

***8** Verizon next argues that the discussions regarding its proposed price were misleading and not meaningful. Comment & Supp. Protest at 24-26. Verizon also argues that by failing to raise the two decreased-confidence elements identified in the offeror's transition and modernization approach, DHS's discussions were not meaningful. Protest at 29-32.

The regulations concerning discussions under FAR part 15, which pertain to negotiated procurements, do not, as a general rule, govern task and delivery order competitions conducted under FAR part 16, such as the procurement for the task order here. *See NCI Info. Sys., Inc.*, B-405589, Nov. 23, 2011, 2011 CPD ¶ 269 at 9. In this regard, FAR section 16.505 does not establish specific requirements for discussions in a task order competition; nonetheless, when exchanges with the agency occur in task order competitions, they must be fair and not misleading. *Id.*; *General Dynamics Info. Tech., Inc.*, B-406059.2, Mar. 30, 2012, 2012 CPD ¶ 138 at 7 (finding that exchanges in the context of FAR section 16.505, like other aspects of such a procurement, must be fair).

In our decisions discussing an agency's obligations in conducting discussions under FAR part 15, we have consistently stated that an agency may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns, or misinform the offeror concerning a problem with its proposal or about the government's requirements. *M.A. Mortenson Co.*, B-413714, Dec. 9, 2016, 2016 CPD ¶ 361 at 8-9. However, in the context of both FAR part 15 and 16 procurements, we have also stated that agencies are not required to "spoon-feed" an offeror during discussions; rather, agencies need only lead offerors into the areas of their proposals that require amplification or revision in order for the discussions to be meaningful. *Engility Corp., supra* at 6; *Clark/Caddell Joint Venture*, B-402055, Jan. 7, 2010, 2010 CPD ¶ 21 at 7.

Here, after the receipt of proposals, the agency held several rounds of exchanges with offerors. COS at 13-16. These exchanges largely concerned clarifications to offerors' price proposals, *e.g.*, the agency requested clarification or correction where Verizon's price workbook did not have prices populated in certain columns. AR, Tab 15g, DHS Exchange with Verizon, Aug. 24, 2020, at 4. As part of the last round of exchanges, DHS informed Verizon that the agency's review had resulted in a concern that the offeror's price may be too high. [12] AR, Tab 33, DHS Exchange with Verizon, Aug. 27, 2020. In its response, Verizon lowered its price to $749,085,499. AR, Tab 9c, Verizon Response to DHS Exchange, Sept. 1, 2020, at 2. The PET subsequently determined that Verizon's price, while higher than those of the other offerors, was fair and reasonable. AR, Tab 15, PET Report at 17.

***9** Verizon argues the agency's discussions were inadequate and "in no way alerted Verizon to . . . the magnitude of the price disparity between Verizon's offer and its competitors." Comments & Supp. Protest at 25. The agency argues that the exchange with Verizon regarding the offeror's price was meaningful and not misleading. Supp. MOL at 12.

When an agency engages in discussions with an offeror in a task order procurement, the discussions must be meaningful, that is, they must lead the offeror into the areas of its proposal that require correction or amplification. *See, e.g., Peraton Inc.*, B-416916.5, B-416916.7, Apr. 13, 2020, 2020 CPD ¶ 144 at 7; *Sabre Sys., Inc.*, B-402040.2, B-402040.3, June 1, 2010, 2010 CPD ¶128 at 6. For Part 15 procurements, the FAR also states the contracting officer is encouraged, but not required, to discuss other aspects of an offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. FAR 15.306(d)(3). A contracting officer, however, is not required to discuss every area where the proposal could be improved in order for the discussions to be meaningful, and the precise content of discussions is largely a matter of the contracting officer's judgment. *Id.*; *see Skyline Ultd, Inc.*, B-416028, B-416028.2, May 22, 2018, 2018 CPD ¶ 192 at 6; *Engility Corp., supra* at 8.

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We find DHS's discussions with Verizon regarding its price provide no basis on which to sustain the protest. The record reflects that, at the time the exchange occurred, the agency was aware that Verizon's price, while less than both its initial offer and the IGCE, was still above those of the other two offerors. DHS then informed Verizon that: "the Government's review of the total evaluated price has resulted in concern that the offered price may be too high. The Government requests Verizon consider the concern and make updates, if Verizon deems them to be required and in its best interest." AR, Tab 33, DHS Exchange with Verizon, Aug. 27, 2020. In response, Verizon elected to lower its price by [DELETED]. We find these discussions to be meaningful, as they were sufficiently detailed so as to lead an offeror into the area of its proposal requiring amplification or revision in a manner to materially enhance the offeror's potential for receiving the award. *Sabre Sys., Inc., supra*. Further, the discussions did not mislead Verizon--either through the framing of a discussion question or a response to a question--into responding in a manner that did not address the agency's concern. *Raytheon Co.*, B-416211 *et al.*, July 10, 2018, 2018 CPD ¶ 262 at 19-20.

***10** We also disagree with Verizon's assertion that our Office "has held that, when offerors submit significantly disparate prices, discussions with a higher-priced offeror are not meaningful unless the agency conveys the "magnitude of the disparity in prices."' Comments & Supp. Protest at 25, *citing Creative Info. Tech., Inc.*, B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110. In *Creative Info. Tech., Inc.*, (CITI), the Army conducted a procurement under FAR part 15 for information technology support services. *Id.* at 1-2. The Army estimated that the work under the solicitation required seven full-time equivalent employees (FTE), which resulted in a government-estimated price of $13 million. *Id.* at 4. By contrast, CITI proposed to staff the effort with 37 FTEs, which resulted in a price of approximately $110 million. *Id.* We found that the agency's discussions with CITI (*i.e.*, "it appears that CITI's total proposed price/cost is overstated") were not meaningful "given the unique circumstances of this case--specifically, the extraordinary disparity between CITI's proposed level of effort and price as compared to the government estimate as well as the level of effort and prices of the other offerors in the competitive range." *Id.* at 7.

We find Verizon's reliance on our *CITI* decision misplaced. As a preliminary matter, *CITI* involved a FAR part 15 procurement, whose regulations concerning discussions do not, as a general rule, govern task and delivery order competitions conducted under FAR part 16, such as the procurement here. Further, in *CITI*, the offeror's price was both (1) so high as to be considered unreasonable, and (2) significantly higher than the IGCE; neither of which exist in the case at hand. More importantly, we found the discussions in *CITI* were not meaningful because the agency was not only aware of CITI's unreasonably high price, but also of the underlying cause. We explained that

> by characterizing the issue simply as one of price, the agency failed to address the underlying cause of CITI's unreasonable pricing--CITI's misconception of the level of effort anticipated by the Army for the . . . requirements. As a consequence, CITI could not reasonably have understood the agency's concern with its proposal or the fact that its proposal required fundamental changes in order to have a reasonable chance of being selected for award.

Id. at 8-9.

In sum, the discussions in *CITI* were not meaningful, and the agency was essentially required to do more than it did, "given the unique circumstances of this case." *Id.* at 7. However, contrary to Verizon's assertion, our decision in *CITI* does not stand for the proposition that discussions with a higher-priced offeror would not be meaningful *unless* the agency conveys the magnitude of the disparity in prices. Here, by contrast, we find the agency's discussions with Verizon were meaningful and not misleading. There was simply no requirement, as the protester argues, for the agency to disclose the disparity between offerors' prices in order for the discussions to be meaningful. *Torrent Techs., Inc.*, B-419326, B-419326.2, Jan. 19, 2021, 2021 CPD ¶ 29 at 13 (finding the discussions to be meaningful and that the agency was not required to provide the protester with the magnitude of the price difference between the awardee and itself); *see Advanced Turbine Engine Co.*, B-417324, B-417324.2, May 30, 2019, 2019 CPD ¶ 204 at 30 (finding that the agency had no obligation to disclose the disparity in the offerors' proposed levels of effort as part of discussions).

***11** Verizon also contends the agency's discussions were not meaningful by failing to include the two decreased-confidence elements identified in the offeror's transition and modernization approach. [13] Protest at 29-32; Comments & Supp. Protest at

35-38. We need not decide, however, whether the agency was required to discuss any of the shortcomings identified in the offeror's technical submission, because Verizon has again failed to demonstrate that it was competitively prejudiced by the challenged agency conduct.

The protester argues that had DHS conducted discussions with it regarding the identified technical shortcomings, Verizon would have addressed these issues. Protest at 31. The protester, however, has not sufficiently demonstrated that it would have changed anything else in its proposal even if provided the opportunity to do so. [14] As we have found that the technical shortcomings in Verizon's proposal were not prejudicial to the protester--their removal would not alter the agency's price/technical tradeoff determination--the discussions regarding same are also without prejudice to Verizon. Quite simply, the protester's competitive standing would not have improved even if the firm had been able to address the shortcomings identified in its transition and modernization approach proposal. *See Picturae Inc.*, B-419233, Dec. 30, 2020, 2021 CPD ¶ 13 at 7.

AT&T's Eligibility for Award

Lastly, Verizon contends that AT&T is not eligible for task order award here, because AT&T's EIS contract does not include the required SD-WAN services. Protest at 36-39; Comments & Supp. Protest at 5-12.

By way of background, the RFP required proposals to comply with the terms and conditions found in GSA's EIS contract. RFP at 5. Section G.3.2.5 (authorization of orders) of the EIS contract provides that an EIS contract holder may compete for an agency task order--even if it does not have all of the agency-required services included on its EIS contract--if the contractor, at the time of its task order proposal submission, submits to GSA a modification adding the missing services (and the associated pricing) to its EIS contract. *See* AR, Tab 37, EIS Contract, § G.3.2.5. Section G.3.2.5 goes on to specifically state that contractors are prohibited from accepting a task order for services that are not on their EIS contract (unless GSA has processed the EIS contract modification(s) and added the to-be-performed services and related pricing to a firm's EIS contract). [15] AR, Tab 37, EIS Contract, § G.3.2.5, at 11; *see also* AR, Tab 22, EIS Fair Opportunity and Ordering Guide at 21.

Verizon argues that AT&T is ineligible for task order award because (unlike Verizon) AT&T's EIS contract does not include SD-WAN services. Protest at 37. In support thereof, Verizon contends that "[a]ccording to the EIS Public Pricer--a publicly available GSA database for the EIS IDIQ contract--AT&T does not offer SD-WAN services under its GSA EIS IDIQ contract." [16] *Id.* Additionally, the protester argues that DHS's evaluation of AT&T's approach to SD-WAN implementation (as part of the offeror's transition approach) was unreasonable because "AT&T must enter into negotiations with GSA, and then wait for GSA to issue the modifications needed to add SD-WAN services to AT&T's EIS contract" before such services can be delivered to DHS. Comments & Supp. Protest at 14; *see* Protest at 39-42.

***12** The agency--as well as AT&T--does not dispute that AT&T's EIS contract does not include SD-WAN services. MOL at 28; AT&T Comments at 27. Rather, DHS argues "the solicitation simply did not require SD-WAN services," and that the agency properly differentiated between EIS's SD-WAN managed services and what was required by the solicitation here (*i.e.*, SD-WAN enabled equipment). [17] MOL at 28. Additionally, AT&T and DHS both argue that this aspect of Verizon's protest is untimely, as Verizon knew or should have known of its basis of protest here at the time it filed its previous protest and challenged AT&T's eligibility for task order award. AT&T Partial Dismissal Request, Feb. 5, 2021, at 1-5; Supp. MOL at 2-4. We agree.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. *Logistics Mgmt. Inst.*, B-417601 *et al.*, Aug. 30, 2019, 2019 CPD ¶ 311 at 14. Under these rules, a protest based on other than alleged improprieties in a solicitation must generally be filed no later than 10 days after the protester knew or should have known of the basis for protest. 4 C.F.R. § 21.2(a)(2).

Where a protester initially files a timely protest, and later supplements it with new grounds of protest, the later-raised allegations must independently satisfy our timeliness requirements since our regulations do not contemplate the piecemeal presentation or development of protest issues. *See, e.g., Catalyst Sols., LLC*, B-416804.3, B-416804.4, Apr. 4, 2019, 2019 CPD ¶ 134 at 4; *Vigor Shipyards, Inc.*, B-409635, June 5, 2014, 2014 CPD ¶ 170 at 5; *Savvee Consulting, Inc.*, B-408416.3, Mar. 5, 2014, 2014 CPD ¶ 92 at 5. Also, as relevant here, protest grounds brought after corrective action and re-award of a contract or task order are untimely when the information underpinning such grounds was available to the protester as part of its earlier protest, and the protester failed to raise these grounds in a timely manner. *Catalyst Sols., LLC, supra*; *Savvee Consulting, Inc., supra*.

As set forth above, on September 28, 2020, DHS initially made task order award to AT&T. On October 6, Verizon filed a protest with our Office challenging the evaluation and award to AT&T (B-419271.2), followed by a consolidated supplemental protest on October 13 (B-419271.3). Here, Verizon argued that AT&T was ineligible for award because of AT&T's alleged failure to have all required services on its EIS contract. Protest, B-419271.3, Oct. 13, 2020, at 37. Specifically, based on information obtained from the EIS Public Pricer, Verizon alleged that AT&T had submitted two EIS contract modifications, regarding access arrangement services, which were not approved by GSA until after task order award. *Id.* at 39. Because AT&T's underlying EIS contract did not include all services required by the RFP, Verizon argued, AT&T's proposal could not form the basis for award at the time DHS issued the protested task orders. *Id.* at 39-40. Verizon's protest did not allege that AT&T failed to include any other required services on its EIS contract.

***13** On November 9, the agency informed our Office that it planned to take corrective action by terminating the task orders issued to AT&T, reevaluating proposals, and making a new award decision, DHS Letter to GAO, B-419271.2, B-419271.3, Nov. 9, 2020, and we then dismissed the earlier Verizon protest as academic. *Verizon Bus. Network Servs., Inc.*, B-419271.2, B-419271.3, Nov. 9, 2020 (unpublished decision).

As previously stated, on January 19, 2021, Verizon filed its protest challenging the agency's reevaluation and award to AT&T. On January 21, Verizon filed the supplemental protest here and alleged--for the first time--that AT&T was ineligible for award because of AT&T's purported lack of SD-WAN services as part of its EIS contract. Protest at 36-39. Verizon also declared that a search of the EIS Public Pricer system revealed that AT&T did not offer SD-WAN services under its EIS contract. *Id.* at 37. However, in its prior protest, Verizon raised essentially the same argument, *i.e.*, AT&T's ineligibility for award because of items not part of its EIS contract, based on the same source of information, *i.e.*, the EIS Public Pricer system. Protest, B-419271.3, Oct. 13, 2020, at 37-39. We have frequently stated that we will not consider arguments that could have and should have been raised in prior protests. *See, e.g., The Arcanum Grp., Inc.*, B-413682.4, B-413682.5, Aug. 14, 2017, 2017 CPD ¶ 335 at 6 n.8; *Savvee Consulting, Inc., supra*; *Waterfront Techs., Inc.--Protest & Costs*, B-401948.16, B-401948.18, June 24, 2011, 2011 CPD ¶ 123 at 10 n.12.

Verizon does not dispute that its protest here involves essentially the same issue as its earlier protest (AT&T's award eligibility), based on essentially the same source of information (the EIS Public Pricer). *See* Verizon Response to AT&T Partial Dismissal Request at 1-7. Rather, the protester argues that the EIS Public Pricer, while a public source, is not an official public medium for which it is charged with constructive notice. *Id.* at 2, *citing WorldWide Language Res., Inc.; SOS Int'l Ltd.*, B-296984 *et al.*, Nov. 14, 2005, 2005 CPD ¶ 206. Verizon also contends that the information regarding AT&T's alleged lack of SD-WAN services came from a different particular webpage within the EIS Public Pricer than its prior challenge regarding AT&T's alleged lack of access arrangement services. *Id.* at 1, 5. We find these arguments unavailing.

First, we do not find that Verizon had constructive knowledge of the contents of the EIS Public Pricer. Rather, we find that Verizon knew or should have known of its basis of protest here when it previously challenged AT&T's award eligibility because the information underpinning the current protest ground was available to the protester as part of its earlier protest. *Catalyst Sols., LLC, supra*. Likewise, the fact that the information regarding AT&T's alleged lack of SD-WAN services came from a different webpage (within the same EIS Public Pricer tool) does not negate the fact that the information was just as available to Verizon before as it is now. Quite simply, as Verizon did not file its protest challenging AT&T's award eligibility (for a lack

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of SD-WAN services) until January 21, 2021, more than 10 days after it knew or should have known of its basis of protest, we find this to be a piecemeal presentation of issues and therefore untimely. *Savvee Consulting, Inc., supra*.

***14** In sum, Verizon's many claims of improper agency action in the evaluation of proposals are either without merit, untimely, or fail to alter the offeror's competitive standing, and therefore provide no basis on which to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel

Footnotes

1 Although this is a task order competition under a multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contract, the agency issued the solicitation as an RFP rather than a request for quotations and refers to the submissions of proposals from offerors instead of quotations from vendors. For consistency and ease of reference to the record, we do the same.

2 GSA's EIS is a multiple-award IDIQ contract awarded on July 31, 2017, to provide agencies with telecommunications services on a global basis. AR, Tab 37, GSA EIS Contract No. GS00Q17NSD3000 (EIS Contract) § C.1.3. The EIS contract defines services by Core Based Statistical Areas (CBSAs), which are used to group federal user locations into standard geographic areas approximating individual telecommunications markets. *Id.* The EIS contract includes more than 900 CBSAs, and each CBSA includes numerous mandatory and optional services. *Id.* at §§ B.1.2.1.1.1 and J.1.1. Each permissible individual pricing element (*e.g.*, individual mandatory or optional services) within a CBSA is identified by a Contract Line Item Number (CLIN). *Id.* at § B.1.2.1.1.1; *see also CenturyLink QGS*, B-418556.3, Sept. 8, 2020, 2020 CPD ¶ 293.

3 The solicitation was subsequently amended three times. Unless stated otherwise, all citations are to the final conformed version of the RFP.

4 The four task orders were for different components within DHS; however, all tasks orders involved the same SOW requirements and evaluation criteria.

5 As the value of the issued task orders (both individually and collectively) was greater than $10 million, the procurement here is within our jurisdiction to hear protests related to the issuance of task orders under IDIQ contracts awarded by civilian agencies. 41 U.S.C. § 4106(f); *Analytic Strategies LLC; Gemini Indus., Inc.*, B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 340 at 4-5.

6 Verizon also protested that: (1) AT&T failed to price all CLINs as required by the RFP and the agency relaxed this requirement for AT&T; (2) the agency's discussions with Verizon were not meaningful specifically because the agency failed to communicate to Verizon the relaxation of this requirement; and (3) the agency failed to consider the actual relative cost of proposals specifically because AT&T failed to price all CLINs and DHS would be required to purchase legacy services under the incumbent contract. Protest at 14-29. Verizon subsequently elected to withdraw these protest grounds. Verizon Letter to GAO, Mar. 31, 2021, at 1.

7 Verizon contends that our Office has recognized that disparate prices provide a basis to conclude that offerors did not compete on a common basis. Comments & Supp. Protest at 17, *citing PCA Aerospace, Inc.*, B-293042.3, Feb. 17, 2004, 2004 CPD ¶ 65; *Federal Sec. Sys., Inc.*, B-281745.2, Apr. 29, 1999, 99-1 CPD ¶ 86. The decisions relied on by the protester, however, concern challenges to agencies' decisions to take corrective action in response to a protest. In *PCA Aerospace* and *Federal Security Systems*, we concluded that the agencies' decisions to take corrective action based on significant differences in the offerors' proposed prices were reasonable. These decisions relied on the broad **discretion** afforded to agencies to take **corrective action**. As we explained, it is not necessary for an agency to conclude that the protest is certain to be sustained before it may take **corrective action**; where the agency has reasonable concern that

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there were errors in the procurement, even if the protest could be denied, we view it as within the agency's **discretion** to take **corrective action**. *Federal Sec. Sys., Inc., supra*, at 4-5. The protester here does not establish that the differences between the proposed prices, alone, demonstrates a lack of common understanding among the offerors.

8 The TET also identified a third shortcoming in Verizon's proposal under the performance management approach factor, which the protester does not dispute.

9 In this regard, the SOW stated: "*Note* that the offeror will only manage their own network . . . and . . . their own NOC [network operations center], not a DHS NOC. MNS services in the pricing tables . . . are for specialized services, not general DHS WAN MNS service." SOW at 104 (emphasis added).

10 Verizon also protested the other decreased-confidence element found in its transition and modernization approach, *i.e.*, the total time and method for the offeror to complete SD-WAN deployment was unclear. Protest at 33-34. We consider this argument abandoned, since the agency provided a detailed response to the protester's assertion in its report to our Office (MOL at 25-26), and Verizon elected not to reply to the agency's response in its comments (Comments & Supp. Protest, *passim*). *See Citrus College; KEI Pearson, Inc.*, B-- 293543 *et al.*, Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4.

11 In any event, we find the decreased-confidence element assigned to Verizon's proposal for its over-emphasis of MNS, as well as the evaluation of its transition plan, to be unobjectionable. Likewise, we find that Verizon's challenges to the evaluation of AT&T's technical proposal provide no basis on which to sustain the protest.

12 At the time this exchange occurred, Verizon's price was then $[DELETED], as compared to the independent government cost estimate (IGCE) of $1,934,414,582, AT&T's price of $[DELETED], and Offeror C's price of $[DELETED]. AR, Tab 15, PET Report at 8, 14. Also, Verizon had already lowered its proposed price from its initial submission of $[DELETED] to $[DELETED]. *Id.* at 8.

13 Although the TET also identified a third decreased-confidence element in Verizon's proposal, under the performance management approach factor, the protester has not alleged that this negative element was required to be a subject for discussions.

14 Although the protester alleges that Verizon would have "likely made other changes to its pricing and overall approach," Protest at 32, the protester fails to explain, or demonstrate, how it actually would have otherwise changed its proposal had it been afforded an opportunity to engage in discussions. *Prism Maritime, LLC*, B-409267.2, B-409267.3, Apr. 7, 2014, 2014 CPD ¶ 124 at 7 n.7; *see also Northrop Grumman Tech. Servs., Inc.; Raytheon Tech. Servs. Co.*, B-291506 *et al.*, Jan. 14, 2003, 2003 CPD ¶ 25 at 35.

15 Our Office also recognized these requirements in a recent unrelated protest, finding that an offeror's proposal "could not form the basis for award at the time the agency issued the protested task orders because [the company]'s underlying EIS IDIQ contract did not include all services required by the solicitation." *Verizon Bus. Network Servs., Inc.*, B-418073 *et al.*, Dec. 26, 2019, 2020 CPD ¶ 13 at 8.

16 The EIS Public Pricer is a publicly-accessible online system that "allows public users to compare prices for vendor telecommunication services provided under the EIS contract." EIS Public Pricer User Guide, Oct. 1, 2020, at 10, https://eis-publicpricer.eos.gsa.gov (last visited April 19, 2021).

17 The agency points to the fact that, among other things, none of the CLINs within the RFP here were the SD-WAN managed services CLINs found on the EIS contract. COS at 29; Supp. MOL at 4.

B- 419271.5 (Comp.Gen.), B- 419271.6, B- 419271.8, 2021 CPD P 191, 2021 WL 1923433

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KeyCite Red Flag - Severe Negative Treatment
Reversed by Dell Federal Systems, L.P. v. United States, Fed.Cir., October 5, 2018

133 Fed.Cl. 92
United States Court of Federal Claims.

DELL FEDERAL SYSTEMS, L.P.,
and Blue Tech Inc., Plaintiffs,
and
Iron Bow Technologies, LLC,
et al., Plaintiff–Intervenors,
v.
The UNITED STATES, Defendant,
and
Alphasix Corp., et al., Defendant–Intervenors.

Nos. 17–465C, 17–473C
|
(Reissued for Publication: July 13, 2017) [1]
|
(Filed Under Seal: July 3, 2017)

Synopsis
Background: Former awardees of commercial off-the-shelf (COTS) computer hardware contract with Army filed bid protests seeking declaratory and injunctive relief and challenging Army's decision to take corrective action by reopening procurement, requesting revised proposals, holding post-award discussions, and issuing new award decisions, after multiple previous administrative protests filed at Government Accountability Office (GAO), determining that Army was obligated to conduct discussions with bidders prior to award of contracts unless Army had reasonable basis for not doing so. After consolidation of protests and intervention by other former awardees, as plaintiff intervenors, and by disappointed bidders, as defendant intervenors, parties cross-moved for judgment on administrative record.

Holdings: The Court of Federal Claims, Wheeler, J., held that:

[1] Army rationally identified procurement defects;

[2] Army's corrective action was overbroad;

[3] Army's overbroad corrective action was prejudicial; and

[4] permanent injunctive relief was warranted.

Plaintiffs' motion granted.

West Headnotes (30)

[1] **Public Contracts** Reconsideration
United States Reconsideration
A bid protest of corrective action by a federal contracting agency is in the nature of a pre-award claim.

[2] **Public Contracts** Scope of review
United States Scope of review
A federal contracting agency's procurement decision does not violate the Administrative Procedure Act (APA) if the agency provided a coherent and reasonable explanation for its exercise of discretion. 5 U.S.C.A. § 706(2)(A).

[3] **Public Contracts** Scope of review
United States Scope of review
In a pre-award bid protest challenging an agency's corrective action regarding a federal procurement, the agency's action does not violate the Administrative Procedure Act (APA) if the agency provided a coherent and reasonable explanation of its exercise of discretion. 5 U.S.C.A. § 706(2)(A).

[4] **Public Contracts** Reconsideration
United States Reconsideration
Federal contracting officers are provided broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition.

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[5] **Public Contracts** Reconsideration

United States Reconsideration

In cases involving corrective action for a federal procurement, the agency's corrective action must be rationally related to the defect to be corrected.

4 Cases that cite this headnote

[6] **Public Contracts** Scope of review

United States Scope of review

On judicial review of an agency's corrective action regarding a federal procurement, the evidence in the record must show that the agency: (1) identified a defect in the procurement, and (2) considered the ways in which its corrective action would remedy the defect.

1 Cases that cite this headnote

[7] **Public Contracts** Scope of review

United States Scope of review

The review of the Court of Federal Claims is deferential to the federal contracting agency as long as the agency has rationally explained its corrective action decision.

[8] **Public Contracts** Scope of review

United States Scope of review

In a bid protest challenging a federal contracting agency's decision to take corrective action, even if the agency acted without a rational basis, Court of Federal Claims cannot grant relief unless the agency's action prejudiced the protestor.

[9] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

A party who has the opportunity to object to the terms of a federal government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection after the close of the bidding process.

[10] **Public Contracts** Reconsideration

United States Reconsideration

Litigation risk itself is not a procurement defect that can be the predicate for corrective action of the federal procurement; rather, when agency counsel acknowledges litigation risk in a bid protest, he acknowledges that the procurement may have contained defects.

[11] **Public Contracts** Reconsideration

United States Reconsideration

When an agency takes corrective action for a federal procurement, in response to its counsel's assessment, the agency's corrective action targets these defects rather than any legal liability; therefore, it is reasonable for the agency to take corrective action to remedy procurement defects even where the agency may have faced no litigation risk because it may have won a bid protest on procedural grounds.

1 Cases that cite this headnote

[12] **Public Contracts** Reconsideration

United States Reconsideration

Contracting officers are vested with broad discretion to take corrective action for a federal procurement when doing so would ensure fair and impartial competition.

[13] **Public Contracts** Reconsideration

United States Reconsideration

Neither the federal acquisition regulations nor any other law limits the contracting officer's discretion to decide to take corrective action when confronted with a procurement defect, even where a bid protest founded upon that defect might be untimely.

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[14] **Public Contracts** Reconsideration

United States Reconsideration

It is not necessary for an agency to conclude that a bid protest is certain to be sustained before the agency may take corrective action for a federal procurement; rather, where the agency has reasonable concern that there were errors in the procurement, it is within the agency's discretion to take corrective action even if the protest could be denied.

1 Cases that cite this headnote

[15] **Public Contracts** Reconsideration

United States Reconsideration

An agency cannot take corrective action to correct a federal procurement if the procurement is not defective.

[16] **Public Contracts** Reconsideration

United States Reconsideration

Army rationally determined that spreadsheet ambiguities and lack of discussions with bidders were procurement defects, in deciding to take corrective action by reopening procurement, conducting post-award discussions, and issuing new award decisions for contracts to provide commercial off-the-shelf (COTS) computer hardware, where Army recognized bidders' common failure to correctly fill out certain parts of spreadsheet that were confusing and resulted in Army finding many proposals technically unacceptable, and Army's reasons for deciding not to conduct pre-award discussions, due to inconvenience and lack of better results in hardware variety, were threadbare and conclusory.

1 Cases that cite this headnote

[17] **Public Contracts** Scope of review

United States Scope of review

In a bid protest, Court of Federal Claims does not review an agency's legal conclusions about potential procurement defects de novo, as would an appellate tribunal; rather, the court's role is to review agency decisions for their rationality.

2 Cases that cite this headnote

[18] **Public Contracts** Reconsideration

United States Reconsideration

Even where a federal agency has rationally identified defects in its procurement, its corrective action must narrowly target the defects it is intended to remedy.

3 Cases that cite this headnote

[19] **Public Contracts** Reconsideration

United States Reconsideration

Under the overbreadth principle, a federal contracting agency cannot use relatively minor defects to justify the full-scale opening of discussions and allowing revisions to proposals that do not relate to the defects.

[20] **Public Contracts** Reconsideration

United States Reconsideration

Army's proposed corrective action in response to procurement defects, by reopening procurement, conducting post-award discussions, and issuing new award decisions for contracts to provide commercial off-the-shelf (COTS) computer hardware, was overbroad, as corrective action was not rationally related to procurement defects; Army allowed all bidders, no matter how egregious their bid proposal errors, to receive second chance at submitting compliant proposals with new prices under unchanged solicitation, despite having disclosed former awardees' winning prices, and Army failed to consider more narrowly targeted solution of seeking clarification from bidders that were directly affected by defects that resulted in their minor or clerical errors and then reevaluating only those bids. 48 C.F.R. § 15.306(a)(1).

3 Cases that cite this headnote

[21] **Public Contracts** Evaluation process

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United States Evaluation process

Though they address minor or clerical errors in a federal procurement, clarifications can result in substantive changes to an offeror's proposal; for example, clarifications by one offeror could lead to an increase in its past performance score or perhaps tilt the contract award in its favor. 48 C.F.R. § 15.306(a)(1).

3 Cases that cite this headnote

[22] **Public Contracts** Evaluation process

United States Evaluation process

Clarifications of a federal procurement are not to be used to cure deficiencies or material omissions in a bidder's proposal, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. 48 C.F.R. § 15.306(a)(1).

1 Cases that cite this headnote

[23] **Public Contracts** Evaluation process

United States Evaluation process

Generally, clarifications are appropriate for correcting non-material or clerical errors in a federal procurement; however, more substantive exchanges require discussions with bidders. 48 C.F.R. § 15.306(a)(1).

1 Cases that cite this headnote

[24] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

Court of Federal Claims cannot grant relief in a bid protest unless the federal agency's unlawful procurement action has prejudiced the protestors.

[25] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

In pre-award protests and, consequently, in protests challenging corrective action for a federal procurement, a bid protestor establishes prejudice by showing a non-trivial competitive injury which can be addressed by judicial relief.

[26] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

Army's overbroad proposed corrective action in response to procurement defects, by reopening procurement, conducting post-award discussions, and issuing new award decisions for contracts to provide commercial off-the-shelf (COTS) computer hardware, was prejudicial to former contract awardees, since corrective action constituted non-trivial competitive injury to awardees by substantially decreasing their chance of receiving award after Army had disclosed their prices to all bidders.

1 Cases that cite this headnote

[27] **Injunction** Grounds in general; multiple factors

Court of Federal Claims may grant injunctive relief if: (1) plaintiff has succeeded on the merits, (2) plaintiff will suffer irreparable harm if the court withholds injunctive relief, (3) balance of hardships to the respective parties favors the grant of injunctive relief, and (4) public interest is served by a grant of injunctive relief.

[28] **Injunction** Award of contract; bids and bidders

Bid protestors would suffer irreparable harm by being forced to recompete for contracts with Army to provide commercial off-the-shelf (COTS) computer hardware that they had already won and by being forced to bid against their own prices that Army had disclosed to other bidders, in absence of permanent injunction barring Army's overbroad proposed corrective action of reopening procurement, requesting revised proposals, holding post-award discussions, and issuing new award decisions.

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[29] **Injunction** Award of contract; bids and bidders

Balance of hardships favored permanent injunction barring Army's overbroad proposed corrective action of reopening procurement, requesting revised proposals, holding post-award discussions, and issuing new award decisions for contracts to provide commercial off-the-shelf (COTS) computer hardware, since bid protestors would face elevated risk of losing their former contract awards if Army pursued corrective action, but barring proposed correction action would relieve Army from need to review every proposal anew.

[30] **Injunction** Award of contract; bids and bidders

Public interest supported grant of permanent injunction barring Army's overbroad proposed corrective action of reopening procurement, requesting revised proposals, holding post-award discussions, and issuing new award decisions for contracts with Army to provide commercial off-the-shelf (COTS) computer hardware, since allowing Army to respond disproportionately to minor procurement errors harmed integrity of procurement system by introducing unfair and unanticipated additional layer of competition, and Army could still pursue more reasonable and narrowly tailored corrective action of seeking clarification from bidders directly affected by defects that resulted in their minor or clerical errors and then reevaluating only those bids.

Attorneys and Law Firms

***95** Michael F. Mason, with whom were C. Peter Dungan, Christine Reynolds, and Thomas A. Pettit, Hogan Lovells US LLP, Washington, D.C., for Plaintiff Dell Federal Systems, L.P.;

***96** Michael J. Anstett, with whom were James J. McCullough, Neaha P. Raol, and Brendan C. McNamara, Fried, Frank, Harris, Shriver & Jacobson LLP, Washington, D.C., for Plaintiff Blue Tech Inc.;

Joseph E. Ashman, Trial Attorney, with whom were Chad A. Readler, Acting Assistant Attorney General, Robert E. Kirschman, Jr., Director, and Martin F. Hockey, Jr., Deputy Director, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, D.C., for Defendant;

Jerry Alfonso Miles, Deale Services, LLC, Rockville, Maryland, for Plaintiff–Intervenor Govsmart, Inc.;

Maria L. Panichelli, with whom was Robert G. Ruggieri, Cohen, Seglias, Pallas, Greenhall & Furman, P.C., Philadelphia, Pennsylvania, for Plaintiff–Intervenor Ideal Systems Solutions, Inc.;

Thomas K. David, with whom were Kenneth D. Brody and Katherine A. David, David, Brody & Dondershine, LLP, Reston, Virginia, for Plaintiff–Intervenor NCS Technologies, Inc.;

Joseph P. Hornyak, with whom were Elizabeth N. Jochum and Rodney M. Perry, Holland & Knight LLP, Tysons, Virginia, for Plaintiff–Intervenor Red River Computer Co., Inc.;

Anthony J. Marchese, with whom were Carol L. O'Riordan, Pamela J. Bethel, and Taimur Rabbani, O'Riordan Bethel Law Firm, LLP, Washington, D.C., for Defendant–Intervenor Alphasix Corp.;

Daniel R. Forman, with whom were Jonathan M. Baker, Elizabeth A. Buehler, and Nkechi A. Kanu, Crowell & Moring LLP, Washington, D.C., for Defendant–Intervenor HPI Federal, LLC;

David M. Nadler, with whom were David Y. Yang, Adrien C. Pickard, and Philip E. Beshara, Blank Rome LLP, Washington, D.C., for Defendant–Intervenor CDW Government LLC;

Gerald H. Werfel, with whom was Ian A. Cronogue, Baker, Cronogue, Tolle & Werfel, LLP, McLean, Virginia, for Defendant–Intervenor Insight Public Sector, Inc.;

Anne B. Perry, with whom were Matthew W. Turetzky, and Keeley A. McCarty, Sheppard Mullin Richter & Hampton LLP, Washington, D.C., for Defendant–Intervenor Sterling Computers Corp.

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Bid Protest Challenging Agency Corrective Action; Multiple Award IDIQ Contracts; Proposal Discussions Contrasted With Clarifications; Effect of Blue & Gold Fleet; Declaratory and Injunctive Relief.

OPINION AND ORDER

WHEELER, Judge.

Plaintiffs brought this bid protest to challenge the Department of the Army's decision to take corrective action after multiple previous protests had been filed at the Government Accountability Office ("GAO"). The underlying solicitation sought to procure commercial off-the-shelf computer hardware through indefinite-delivery, indefinite quantity contracts with the Army. Fifty-eight offerors submitted proposals, and the Army found only nine of those proposals to be technically acceptable. The Army awarded contracts to each of the nine technically acceptable offerors.

Twenty-one of the unsuccessful offerors filed protests at the GAO. The protesters mainly alleged that the solicitation contained several ambiguities causing the offerors to submit technically unacceptable proposals. The protesters argued that they could have corrected the flaws in their proposals if the Army had requested clarifications or engaged in discussions with offerors.

After analyzing the GAO protests, the Army determined that the GAO protests represented a significant litigation risk. The Army's counsel found that Department of Defense Federal Acquisition Regulation Supplement ("DFARS") § 215.306(c), in conjunction with a recent GAO decision, In re Science Applications International Corp., B–413501.2, 2016 WL 6892429 (Nov. 9, 2016), meant that the Army was obligated to conduct discussions with offerors unless it had a reasonable basis for forgoing such discussions. The Army thought it possible that the GAO could find the Army lacked a reasonable basis to forgo discussions, and therefore it decided to implement corrective action by reopening the procurement, conducting discussions ***97** with virtually all of the offerors, and allowing offerors to resubmit proposals with new pricing. Complicating matters, the Army had disclosed the prices of the nine contract awardees.

Plaintiffs and Plaintiff Intervenors (the "Protesters")—six of the original contract awardees—now challenge the Army's corrective action. They argue that it was arbitrary and capricious for the Army to decide that corrective action was appropriate in this case. They further challenge the scope of the Army's corrective action, as well as the Army's decision to release their winning proposal prices. Those receiving contracts rightly complain that they would be at a significant competitive disadvantage in having to compete again for contracts they had rightly won in the first instance. They seek a permanent injunction that would forbid the Army from implementing the corrective action. Five of the previously unsuccessful offerors have joined this suit as Defendant–Intervenors. They, along with the Government, defend the Army's corrective action as a reasonable response to a reasonable assessment of litigation risk.

Most of the parties have submitted cross-motions for judgment on the administrative record. The Court heard oral argument on the cross-motions on June 14, 2017. After considering the parties' arguments, the Court finds that the Army's contemplated corrective action is not narrowly targeted to address the procurement defects the Army has identified. While discussions would have been permissible *before* the Army announced its contract awards, the Army elected to make awards without discussions. The administrative record reflects the consequences of that decision: many offerors made minor errors filling out the Army-provided spreadsheets and submitted technically unacceptable proposals as a result. These consequences are relatively minor, and the Court finds that clarifications and reevaluation would suffice to remedy them. On the other hand, discussions paired with re-solicitation would represent a blunderbuss approach to corrective action that neither the record nor the law supports. There is no reason to reopen the competition and invite new proposals, particularly where the Army's requirements have not changed. Therefore, the Court GRANTS Plaintiffs' and Plaintiff–Intervenors' motions for judgment on the administrative record. The Court similarly grants their motions for a permanent injunction barring the Army's proposed corrective action. Defendant's and Defendant–Intervenors' motions are DENIED. As the Court will explain, the Army surely can formulate some acceptable form of corrective action short of engaging in full-blown discussions and requesting a new round of proposals. The simple use of clarifications and reevaluation of proposals would cause many of the unacceptable proposals to become acceptable, and thereby eligible for award.

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Background

A. The Army's Solicitation

The Army, acting through the Army Contracting Command at Rock Island, Illinois, issued Solicitation W52P1J–15–R–0122 on May 3, 2016. AR Tab 17 at 153.[2] The solicitation would begin a new iteration of the Army Desktop Mobile and Computing program, known as ADMC–3. See id. at 155. The Solicitation sought indefinite-delivery, indefinite-quantity contracts for "commercial-off-the-shelf (COTS) desktop computers, integrated desktop computers, workstations, electronic display, notebooks, tablet computers, slate, thin client, ultra-thin client, printers, multifunction devices and warranty." Id. The awardees would perform by filling firm fixed-price delivery orders. Id. The Army guaranteed that it would place a minimum of $10,000 in delivery orders with each awardee, which would "require each successful offeror to provide 1–2 laptops, tablets or peripherals to be determined at the time of award." Id. at 156. Still, the Army contemplated ordering far more equipment under the contract, and the contract's total estimated value is $5 billion. Id. at 155; AR Tab 69 at 4324.

***98** Offerors were evaluated based on "an integrated assessment of three evaluation factors:" Technical Approach, Past Performance, and Price. AR Tab 17 at 199. Factor 1 (Technical Approach) was divided into two subfactors: Equipment Submission Form and Business Process Form. Id. To be considered for an award, the solicitation required an "acceptable" rating for the Technical Approach (including both subfactors) and Past Performance factors. Id.

The solicitation directed offerors to submit their proposals in four "volumes:" Technical Approach, Past Performance, Price, and Contracts/Business. Id. at 195. Offerors were required to complete Army-provided Excel spreadsheets for the Equipment Submission form and Business Process Form subfactors as part of Volume 1. Id. For both subfactor spreadsheets, the solicitation instructed offerors to "complete all cell entries and the information provided shall demonstrate that the minimum requirements outlined in the Statement of Work (SOW) are met or exceeded." Id. at 196. The instructions also stated that "an incomplete or blank entry will indicate that the proposed item does NOT meet the minimum requirements." Id.

The Army intended to award "at least eight" contracts to the offerors who submitted the lowest-priced technically acceptable proposals, but reserved the right to make "as many, or as few, awards as deemed appropriate." Id. at 155. The awards would be divided into two categories: those reserved for small business, and those available through full and open competition. Id. at 198. For the first category, the Army intended to "select the five lowest priced Small Business Offerors for award, provided that five responsible small business proposals [were] found to be acceptable in all non-price factors." Id. For the full and open competition category, the Army intended to award three contracts to the non-small-business offerors who submitted the lowest-priced technically acceptable proposals. Id.

Finally, the solicitation stated that the Army "intend[ed] to award without conducting discussions with Offerors." Id. at 193.[3] However, "the Government reserve[ed] the right to conduct discussions and to permit Offerors to revise proposals if determined necessary by the Contracting Officer." Id. Further, if the Army chose to open discussions, "all proposals, to include small business proposals previously removed for unacceptability ... [would] be included," after which the Army would reevaluate proposals in accordance with the solicitation. Id. at 198. The Army similarly noted that it could, "solely at its discretion, enter into clarifications or communication as needed" with offerors as part of the evaluation process. Id. at 193.

B. The Army's Evaluation and Award Decisions

All proposals from offerors were due by August 4, 2016. AR Tab 31 at 392. Fifty-eight offerors had submitted proposals by that date (fifty-two from small businesses and six from large businesses). AR Tab 69 at 4327. The Army found that three of the fifty-eight proposals did not comply with the solicitation's requirements, so the Army only evaluated the remaining fifty-five proposals. Id. The Source Selection Evaluation Board ("SSEB") evaluated all offerors under the first factor (Technical Approach), and did not evaluate offerors' proposals under the other two factors if the offeror was rated unacceptable for the first factor. See id. at 4329–30, 4334–40. The SSEB rated only nine proposals acceptable under factor one, and rated each of these nine proposals acceptable under the other two factors. Id.

In a briefing for the Source Selection Authority on the evaluation results, the SSEB addressed the possibility of discussions and recommended that the Army not conduct them. Id. at 4347. Specifically, the SSEB reasoned:

1) We do not have a meaningful reason to open discussions

2) Opening discussions would significantly delay award of ADMC–3 because:

***99** • Past performance team would have to evaluate and write past performance reports for 46 remaining offerors

• All evaluation teams would have to evaluate final proposal revisions after discussions are opened

3) Based on the prices and items being offered, opening discussions would not result in a greater variety of laptops, desktops, etc.

Id. at 4348. Therefore, the Army did not conduct discussions, and it awarded contracts to the nine technically acceptable offerors on February 16, 2017 (it notified the unsuccessful offerors on the same date). See AR Tabs 75–84. The Army's letters to the unsuccessful offerors disclosed the nine awardees' total proposed prices. AR Tab 84.

C. The GAO Protests and the Army's Corrective Action

Twenty-one of the unsuccessful offerors filed protests with the GAO between February 21 and March 9, 2017 challenging the Army's award decisions. See AR Tabs 85–105. The GAO protesters primarily alleged that clerical errors and other misunderstandings concerning the Equipment Submission Form spreadsheet had led them to submit technically unacceptable proposals. Several protesters also argued that the Army should have engaged in discussions with offerors to resolve these spreadsheet-related misunderstandings. In response to the protests, the Army instructed the nine awardees to stop work under their contracts on February 22, 2017. AR Tab 106.

On March 21, 2017, the Army advised the GAO that it planned to take corrective action in response to the twenty-one protests. AR Tab 107a. The Army announced that it would open discussions with all remaining offerors, request final proposal revisions with revised pricing, and issue new award decisions. Id. The Army documented its reasons for taking corrective action in a Memorandum for Record ("MFR") dated March 22, 2017. AR Tab 110b. The MFR mainly quotes a previous memorandum prepared by George Farley, an Army Attorney–Advisor. Id. Mr. Farley explained the possible impact of DFARS § 215.306(c) on the pending GAO protests. Id. at 5832. That section states, "for acquisitions with an estimated value of $100 million or more, contracting officers should conduct discussions." Mr. Farley noted that while no GAO decision had overturned an agency decision not to conduct discussions in a procurement valued over $100 million, "the GAO will review these cases to ensure the agency's rationale for not holding discussions is reasonable." Id. at 5832.

Through the lens of a hypothetical GAO review, Mr. Farley found that the Army's grounds for not conducting discussions likely were unreasonable. First, he found that the agency's desire for convenience in not evaluating and writing past performance reports for the forty-six remaining offerors did not pass muster. Id. at 5833–34. He noted that "[b]eing convenient or providing an efficiency to the Agency is rarely, if ever, a reasonable rationale for the Agency to not comply with a provision of law." Id. at 5834. He further found the Army's "no greater variety of laptops, desktops, etc." reason unavailing:

> This stand-alone statement, which does not specifically address the more advantageous pricing of the majority of the unacceptable offerors' proposals, is the Agency's best argument for not opening discussions. But, in order to determine reasonableness, we must look at the totality of the circumstances. Therefore, we must weigh the reasonableness of this statement, along with the RFP language that the Agency intended to award without Discussions, against the issues raised regarding unreasonable behavior by the 20 protesters. As summarized above, these issues lend themselves to showing that the spreadsheet errors could have easily and quickly been resolved. Additional issues raised impart either an ambiguity in the requirements or the Government's instructions how to fill out the spreadsheet. A couple of these issues are:
>
> a. The hard-line issue regarding Hard–Drive versus Solid–State Drives;
>
> b. Stating that an upgrade must be an increase in capability but then stating that selection of an item in a drop-down is acceptable when there are items in the ***100** dropdown that are not upgrades to a base model.
>
> These specific issues are detrimentally supported by the Agency's own evaluation when it states that the fifth (5th) most common reason that proposals were found Technically Unacceptable was "the offeror proposed items that did not meet the minimum requirements" of the Agency. Given that the language for the first two (2) reasons is that "the offeror selected 'NA' instead of filling

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> in a required field" and the "offeror provided an incomplete or blank entry which indicates" the item does not meet our requirements, the logical conclusion is that the first two (2) reasons were merely compliance issues with filling out the form rather than a deficiency in the item proposed.

Id. He concluded that, because of these issues, there was "significant litigation risk in defending these [GAO] protests." Id. Mr. Farley then suggested a possible course for corrective action:

> If the Agency were to take corrective action based on the litigation risk, we would be able to resolve all issues alleged in these protests and make a new award decision that is simply based on price alone. ... By only allowing revisions to areas previously determined as deficiencies and allowing Offerors to change price the evaluation would be a reassurance that the Offerors changed the spreadsheet in accordance with our evaluation notice. Allowing Offerors to change price would also benefit the Agency by getting offers that are a better value to the Government.
>
> **RECOMMENDATION**: Due to the significant litigation risk, the ambiguities in the spreadsheet and SOW, and a matter of policy to do what is right, I recommend that we take limited corrective action to resolve the issues with Offerors' Technical Proposals."

Id. at 5835. The Army MFR adopts Mr. Farley's position, and does not give further reasons for the Army's corrective action.

On March 23, 2017, the GAO dismissed all twenty-one protests as academic in response to the Army's notice of corrective action. AR Tab 110c at 5836–37. The next day, the Army sent letters to the fifty-five evaluated offerors. See AR Tab 112. In the letters, the Army advised technically unacceptable offerors of the deficiencies in their original proposals and instructed them to submit their "best and final" proposals. See, e.g., id. at 6013. To the previous awardees, the Army stated, "If you make changes to areas of your technical proposal that have already been found acceptable, you are at risk of being found technically unacceptable." See, e.g., id. at 5861. In all of its letters, the Army further added, "For the Price proposal, you are authorized to change your prices to your best and final prices." Id.

D. The Original Awardees' Current Protest

Dell Federal Systems, L.P. filed this bid protest challenging the Army's corrective action on March 31, 2017. The protest seeks a declaratory judgment that the corrective action is unlawful, as well as a permanent injunction barring the corrective action. See Dell Compl. at 8, Dkt. No. 1. Blue Tech Inc. brought a related protest, and the Court consolidated the two protests on April 3, 2017. Dkt. No. 29. The Government notified the Court on the same date that the Army would voluntarily stay its corrective action for the duration of this protest. Dkt. No. 22. Five other original awardees—Iron Bow Technologies, LLC, Govsmart, Inc., Ideal System Solutions, Inc., NCS Technologies, Inc., and Red River Computer Company, Inc.—have joined this case as plaintiff-intervenors. Similarly, six of the losing offerors have joined this case as defendant-intervenors: Alphasix Corp., HPI Federal, LLC, CDW Government LLC, Insight Public Sector, Inc., Integration Technology Groups, Inc., and Sterling Computers Corp.

The Government and all but one of the defendant-intervenors (Integration Technology Groups) filed motions for judgment on the administrative record on May 3, 2017. The plaintiffs and all but one of the plaintiff-intervenors (Iron Bow Technologies) filed cross-motions on May 17, 2017. The parties completed briefing on May 31, 2017, and the Court heard oral argument on the cross-motions on June 14, 2017.

***101** Discussion

A. Jurisdiction and Standard of Review

[1] The Tucker Act grants this Court subject matter jurisdiction over bid protests. 28 U.S.C. § 1491(b)(1) (2012). The protesters also have standing to challenge the Army's proposed corrective action despite their status as current contract awardees, as a protest of corrective action "is in the nature of a pre-award claim." Sheridan Corp. v. United States, 95 Fed.Cl. 141, 148 (2010) (quoting IMS Servs., Inc. v. United States, 32 Fed.Cl. 388, 398 (1994)).

[2] In a bid protest, the Court reviews agency decisions—including decisions pertaining to corrective action—pursuant to the standards set out in the Administrative Procedure Act ("APA"). 28 U.S.C. § 1491(b)(4) (2012); 5 U.S.C. § 706 (2012). Under the APA, this Court shall set aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2012); see Banknote Corp. of Am., Inc. v. United States, 365 F.3d 1345, 1350–51 (Fed. Cir.

2004). An agency's decision does not violate the APA if the agency "provided a coherent and reasonable explanation of its exercise of discretion." Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332–33 (Fed. Cir. 2001).

[3] **[4]** **[5]** **[6]** **[7]** **[8]** This standard is the same when a Court must consider an agency's corrective action. "Contracting officers are provided broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition." Sheridan, 95 Fed.Cl. at 151 (citation omitted). Therefore, in cases involving corrective action, "the agency's corrective action must be rationally related to the defect to be corrected." Id. (citation omitted). The evidence in the record must show that the agency (1) identified a defect in the procurement, and (2) considered the ways in which its corrective action would remedy the defect. See id. The Court's review is deferential to the agency as long as the agency has rationally explained its corrective action decision. Id. (citing Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054, 1057–58 (Fed. Cir. 2000). Finally, even if the agency acted without a rational basis, the Court cannot grant relief unless the agency's action prejudiced the protester. Bannum, Inc. v. United States, 404 F.3d 1346, 1351 (Fed. Cir. 2005).

B. The Army's Contemplated Corrective Action is not Rationally Related to Defects in the Procurement

The parties' dispute encompasses both elements of the corrective action analysis. First, the parties dispute the existence of a procurement defect in need of correction. Next, the parties disagree as to the appropriate scope of the Army's corrective action. The Court will address each of the parties' arguments in turn.

1. The Army Rationally Identified Procurement Defects

The Government and Defendant–Intervenors have pointed to two defects in the Army's procurement. First, they argue that the Equipment Submission Form spreadsheet the offerors were required to submit with their proposals contained latent ambiguities. Second, they argue that DFARS § 215.306(c) required the Army to conduct discussions unless it reasonably concluded that discussions were unnecessary. According to this view, the Army's decision not to conduct discussions had no reasonable basis in the record, so the failure to conduct discussions was itself a defect. The Protesters argue that any claims predicated upon these alleged defects were waived after the close of the bidding process, so it was irrational for the Army to decide to take corrective action to remedy the defects. In the alternative, they argue that there were no defects in the procurement that could serve as the basis for corrective action.

a. The Timeliness of the GAO Protests has no Bearing on the Rationality of the Army's Decision to Take Corrective Action

[9] As a threshold matter, the Protesters maintain that any claims the GAO protesters might have made about the Army's failure to conduct discussions and ambiguities in the solicitation were waived under Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308 (Fed. Cir. 2007). Pursuant to Blue & Gold Fleet, "a party who has the opportunity to ***102** object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection" after the close of the bidding process. Id. at 1313. This waiver rule ensures that protesters do not sit on their rights and thereby force more expensive litigation after the agency has closed the bidding process. Id. at 1314 (citation omitted). The protesters here argue that if the GAO protesters' claims were waived, then it was irrational for the Army to conclude that it faced litigation risk from the GAO protests, and therefore also irrational to institute corrective action.

[10] **[11]** The Court disagrees. Even if the GAO protesters had waived their claims under Blue & Gold Fleet—a question the Court need not address—it still would be reasonable for the Army to decide to institute corrective action. While the MFR did cite litigation risk as a reason for instituting corrective action, that litigation risk did not stand alone. Rather, the MFR predicates its litigation risk assessment on two apparent procurement defects: (1) common errors offerors made when completing their Equipment Submission Forms, and (2) the Army's decision to forgo discussions. Therefore, it is important conceptually to separate the litigation risk assessment from the procurement defects that caused the risk. Litigation risk itself is not a

procurement defect that can be the predicate for corrective action. Rather, when agency counsel acknowledges litigation risk in a bid protest, he acknowledges that the procurement may have contained defects. When the agency takes corrective action in response to its counsel's assessment, the agency's corrective action targets these defects rather than any legal liability. Therefore, it is reasonable for an agency to take corrective action to remedy procurement defects even where the agency may have faced no litigation risk because it may have won a protest on procedural grounds.

[12] **[13]** Both the Federal Acquisition Regulation ("FAR") and applicable case law support this view. FAR § 1.602–2(b) requires contracting officers to ensure "that contractors receive impartial, fair, and equitable treatment." Similarly, as this Court noted in Sheridan, contracting officers are vested with broad discretion to take corrective action when doing so would ensure fair and impartial competition. 95 Fed.Cl. at 151. Neither the FAR nor any other law limits the contracting officer's discretion to decide to take corrective action when confronted with a procurement defect, even where a protest founded upon that defect might be untimely.

[14] Furthermore, the GAO has found that contracting officers have discretion to take corrective action in a situation similar to the case at bar:

> [I]t is not necessary for an agency to conclude that the protest is certain to be sustained before it may take corrective action; rather, where the agency has reasonable concern that there were errors in the procurement, we view it as within the agency's discretion to take corrective action even if the protest could be denied.

In re Integrated Sci. Sols., Inc., B–406025, 2012 WL 362186, at *2 (Jan. 17, 2012). The GAO's approach is especially prudent where a protest could be denied as untimely under Blue & Gold Fleet. The Blue & Gold Fleet waiver rule protects agencies from expensive litigation; it is not meant to deter agency action that would remedy procurement defects. It would therefore be illogical to allow the Protesters here to use this waiver rule as a club to prevent the Army from addressing errors it has discovered in its procurement. Thus, the Court finds that the timeliness or untimeliness of the GAO protests alone does not render the Army's corrective action irrational.

b. The Army Rationally Determined That Spreadsheet Ambiguities and the Failure to Conduct Discussions Were Procurement Defects

[15] **[16]** It stands to reason that an agency cannot take action to correct a procurement if the procurement is not defective. See Sheridan, 95 Fed.Cl. at 151. Here, the Army (through agency counsel) identified two procurement defects in its MFR: (1) ambiguities in the spreadsheets that offerors were required to submit as part of their proposals, and (2) the Army's failure to conduct discussions ***103** (or adequately consider the reasonableness of conducting discussions).

First, it was rational for the Army to find defects in the ambiguous spreadsheets. In the MFR, Mr. Farley identified "a couple" examples of spreadsheet ambiguities. See AR Tab 110b at 5834. He also noted that the Army had recognized offerors' common failure to fill out certain parts of the Equipment Submission Form correctly. Id. As set out in full above, he identified two representative examples of ambiguity: (a) "The hard-line issue regarding Hard–Drive versus Solid–State Drives"; and (b) "Stating that an upgrade must be an increase in capability but then stating that selection of an item in a drop-down is acceptable when there are items in the drop-down that are not upgrades to a base model." Id. He found that these mistakes were not substantive, but merely "compliance issues with filling out the form."

At oral argument, the Government discussed the "hard line issue" the MFR cites as an example. See Oral Arg Tr. at 65–67, Dkt. No. 135 (June 14, 2017). This issue can be seen in AR Tab 18 (performance notebook sheet). A slightly thicker black line appears between the top three rows of the "operating system" column and the bottom three rows. This circumstance could have led offerors to believe that the top three line items relate to the hard disk drive component, whereas the bottom three line items relate to the solid state disk drive. As the Government notes, "if an offeror was to propose a hard disk drive, it would reasonably understand the spreadsheet's instructions to mean that the offeror did not have to complete rows 27 and 28 and could simply select 'NA.' " This was not the case, as the Army expected offerors to fill in all line items. The hard line issue misled an astonishing nineteen

offerors, who were then found technically unacceptable. See Def. Demonstrative 2. Therefore, it was rational for the Army to conclude that spreadsheet ambiguities such as the hard line issue represented a procurement defect. Put simply, the Army's spreadsheet confused offerors and led many of them to input their line item responses incorrectly. As a result, the Army found many offerors technically unacceptable.

The Court also finds that the Army reasonably considered its failure to conduct discussions to be a procurement defect. The MFR devotes the bulk of its analysis to this issue. See AR Tab 110b at 5832–34. The argument starts with DFARS § 215.306(c), which states, "for acquisitions with an estimated value of $100 million or more, contracting officers should conduct discussions." The MFR then discusses In re Science Applications International Corp., B–413501.2, 2016 WL 6892429 (Nov. 9, 2016) ("SAIC"), a recent GAO case that interprets DFARS § 215.306(c). In SAIC, the GAO found that the regulation means "discussions are the expected course of action in DoD procurements valued over $100 million, but that agencies retain the discretion not to conduct discussions if the particular circumstances of the procurement dictate that making an award without discussions is appropriate." Id. at *8. Therefore, the GAO reviewed the record to determine whether, "given the particular circumstances of this procurement, ... there was a reasonable basis for the agency's decision not to conduct discussions." Id. This was the correct standard of review in spite of the agency's statement in the solicitation that it intended to award a contract without conducting discussions. Id. In the end, the GAO examined the reasonableness of the agency's decision to forgo discussions using three factors: (1) whether there were deficiencies in the protester's proposal, (2) whether "the awardee's proposal was evaluated as being technically superior to the other proposals," and (3) whether "the awardee's price was reasonable." Id. at *9. The solicitation met these criteria, so the agency's decision to forgo discussions in SAIC was reasonable. Id.

The MFR addresses SAIC warily, noting, "Because the SAIC case has now incorporated a means for the GAO to give greater scrutiny to the reasonableness of the Agency's decision to not open discussions, we must also look at the underlying rationale, and not just give automatic deference to the contracting officer's decision." AR Tab 110b at 5833. The MFR then turns to the reasons the Army (through the SSEB) gave for not conducting discussions—the effort involved in ***104** evaluating forty-six more proposals, as well as the fact that there would be no greater variety of computer equipment—and finds them wanting. First, the MFR states, "Being convenient or providing an efficiency to the Agency is rarely, if ever, a reasonable rationale for the Agency to not comply with a provision of law. Therefore, the first reason annotated for not conducting Discussions is not reasonable." Id. at 5834. The MFR also notes that the "totality of the circumstances" showed that the Army's "no greater variety of laptops, desktops, etc." reason was better, but predicted that this reason might not withstand scrutiny given the ease with which the offerors could have revised their proposals. Id. Therefore, the MFR identified the failure to conduct discussions as a procurement defect.

[17] The Court finds the MFR's interpretation of DFARS § 215.306(c) and SAIC reasonable. Here, it is important to note that the Court does not review an agency's legal conclusions about potential procurement defects de novo, as would an appellate tribunal. Rather, the Court's role is to review agency decisions for their rationality. Therefore, the Court finds that it was rational for the Army to find that it may have failed the reasonableness test articulated in SAIC when it decided to forgo discussions. The Court finds that the Army's reasons for forgoing discussions, which are only articulated on one slide in a PowerPoint presentation, are threadbare and conclusory. It is true that here, as in SAIC, the Army announced that it would not conduct discussions. However, when confronted by a situation in which the majority of the offerors appear to have been disqualified because of minor spreadsheet errors, one would expect the Army to explain its reasoning a bit more. After all, had the Army conducted discussions before it awarded its nine contracts, several of the lower-priced offerors may have revised their proposals and been found technically acceptable. Therefore, it was rational for the MFR to find that the Army's failure to conduct discussions constituted a procurement defect.

In sum, the Army rationally identified two procurement defects: (1) ambiguities in the Equipment Submission Form, and (2) the Army's failure to hold discussions.

2. The Army's Contemplated Corrective Action is Overbroad

[18] Even where an agency has rationally identified defects in its procurement, its corrective action "must narrowly target the defects it is intended to remedy." Amazon Web Servs., Inc. v. United States, 113 Fed.Cl. 102, 115 (2013) (citing Sheridan, 95 Fed.Cl. at 153). For example, in Amazon, the GAO found two defects. Id. at 115–16. The first defect was a "price evaluation error" that only affected one part of the procurement. Id. at 115. Therefore, the agency should have simply reevaluated the proposals rather than opening discussions and soliciting final proposal revisions. Id. For the second defect, the GAO found that the agency had impermissibly waived one of the solicitation's material terms. Id. at 116. Instead of targeting its corrective action to the affected portion of offerors' proposals, the agency impermissibly "elected to use [the defect] as an opportunity to amend other aspects of the solicitation." Id. (citation omitted).

[19] **[20]** This case differs from Amazon in that the defects here are not mere evaluation errors. Still, the same overbreadth principle applies: an agency cannot use relatively minor defects to justify the full-scale opening of discussions and allowing revisions to proposals that do not relate to the defects. Here, the Army attempted to craft corrective action that addressed both defects (the ambiguous spreadsheet and the failure to conduct discussions). It opened discussions with all fifty-five remaining offerors and allowed wholesale proposal revisions as long as those revisions responded to the Army's Evaluation Notices ("ENs"). See, e.g., AR Tab 112 at 5960. Those ENs targeted errors not only on the Equipment Submission Form, but also on the Business Process Form. See, e.g., id. at 5914. The Army also allowed offerors to revise their final prices in any way they desired. The broad scope of the corrective action is puzzling because the Army's requirements had not changed, and the contracting officer did not amend the Solicitation when it opened discussions (as the agency had done in Amazon). In sum, the Army opened discussions ***105** in which all remaining offerors, no matter how egregiously they had erred in their initial proposals, simply received a second chance at submitting compliant proposals under an unchanged solicitation.

If the Army wished to comply with the GAO's SAIC decision, it would have been reasonable for the Army to conduct open-ended discussions *before* it awarded its contracts. However, now that the contracts have been awarded, any damage caused by not holding discussions—including the disqualification of several offerors as a result of clerical errors—has been done. The question now is whether holding post-award discussions is a rational remedy for failing to hold pre-award discussions, and the Court finds that this conclusion does not follow. After all, constructing a henhouse gate is not an appropriate remedy after the fox has done its work—one instead needs new chickens.

[21] **[22]** **[23]** With that heavy-handed analogy in mind, there is a more narrowly targeted post-award solution that the Army entirely failed to consider: clarifications and reevaluation. After the agency has received proposals, it may engage in clarification exchanges with offerors pursuant to FAR § 15.306(a). These clarifications "are limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated." 48 C.F.R. § 15.306(a)(1). Furthermore, "[i]f award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals ... or to resolve minor or clerical errors." Id. § 15.306(a)(2). Though they address minor or clerical errors, clarifications can result in substantive changes to an offeror's proposal; for example, "clarifications by one offeror could lead to an increase in its past performance score or perhaps tilt the award in its favor." Info. Tech. & Appl. Corp. v. United States, 316 F.3d 1312, 1323 (Fed. Cir. 2003) (citation omitted). Still, clarifications "are not to be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal." JWK Int'l Corp. v. United States, 52 Fed.Cl. 650, 661 (2002), aff'd, 56 Fed.Appx. 474 (Fed. Cir. 2003) (quoting Charleston Marine Containers, Inc., B–283393, 1999 WL 1015568, at *4 (Nov. 8, 1999)). Thus, the general rule is that clarifications are appropriate for correcting non-material or clerical errors. More substantive exchanges require discussions.

Griffy's Landscape Maintenance LLC v. United States, 46 Fed.Cl. 257 (2000) aptly illustrates the purpose and proper use of clarifications. In Griffy's Landscape, the Court addressed a negotiated procurement in which a bidder's "insurance point of contact information" was missing from

its proposal. Id. at 257. Therefore, the Army evaluated the bidder negatively under the past performance factor. Id. The Army did not hold discussions with offerors, but simply awarded the contract to a different bidder, even though that bidder had submitted a much higher price. Id. at 258. The Court found that the Army had a "duty to inquire" about the absence of this point of contact information, noting that "the government should not be deprived of the best possible contract because of a contractor's clerical error." Id. at 259–60. Faced with such a minor omission, the Army's decision not to seek clarification from the bidder was irrational. Id. at 261. In reaching its conclusion, the Court distinguished GAO decisions such as Charleston Marine, finding that in such cases "the contractors both failed to submit important information and submitted incorrect or non-responsive information. There was no indication this was due to a clerical error. There is a world of difference between material deficiencies and a lost name and number." Id. The Court concluded, "The government's obligation is clear and simple. If it suspects a clerical error, it must ask." Id. at 261.

Though Griffy's Landscape did not analyze clarifications as a means of corrective action, the Court finds that the principles articulated in that case are relevant here. As in Griffy's Landscape, the Court finds that many of the losing offerors in this procurement made minor or clerical errors that fall within the purview of FAR § 15.306(a).[4] Many of the ***106** offerors here did not make material mistakes; rather, they filled out a confusing Excel spreadsheet incorrectly. Mistakenly omitting information from a spreadsheet in this way is akin to the bidder's omission of minor point-of-contact information in Griffy's Landscape. Furthermore, as in Griffy's Landscape, the Army had notice that a clerical error had likely occurred. In Griffy's Landscape, the Army had previously contracted with the bidder, so it should have known that the bidder had compliant insurance information. Id. at 260. Similarly, the Army here knew that ambiguities in its spreadsheet had likely caused offerors to make clerical errors. Indeed, the MFR itself acknowledges the "logical conclusion" that offerors were disqualified because of "mere[ ] compliance issues with filling out the form rather than a deficiency in the item proposed." If this language does not suggest the Army knew that offerors had made clerical errors, it is difficult to see what would.

As such, it was irrational for the Army not to seek clarification from all offerors it knew had been directly affected by the ambiguities it had identified in its own spreadsheet. Doing so would not have given all offerors the chance to make their proposals technically acceptable—there are several offerors who made more wide-reaching errors—but it would have given the offerors who justifiably thought they were proposing compliant equipment the chance to show that they were in fact proposing compliant equipment. The Army then could have reevaluated the offerors' proposals instead of resoliciting new proposals.

In sum, it was irrational for the Army to fail to consider clarifications and reevaluation of proposals as a more natural expedient for the minor clerical errors it had identified. The Army instead opened wide-reaching discussions with all remaining offerors and allowed all offerors to submit modified proposals with new prices, despite having disclosed the awardees' winning prices.[5] This is manifestly overbroad; in fact, it is akin to killing an ant with a sledgehammer when a rolled-up newspaper would have sufficed. Therefore, the Court finds that the Army's corrective action is not rationally related to any procurement defects.

C. The Army's Action Prejudiced the Protesters

[24] **[25]** **[26]** A court cannot grant relief in a bid protest unless the agency's unlawful action has prejudiced the protesters. See Bannum, 404 F.3d at 1351. In pre-award protests and, consequently, in protests challenging corrective action, a protester establishes prejudice by showing "a non-trivial competitive injury which can be addressed by judicial relief." Square One Armoring Serv., Inc. v. United States, 123 Fed.Cl. 309, 320 (2015) (quoting Sys. Appl. & Techs., Inc. v. United States, 691 F.3d 1374, 1382 (Fed. Cir. 2012)). Here, the Army's overbroad corrective action constitutes a non-trivial competitive injury because it substantially decreases the chance each of the Protesters otherwise has of receiving an award. Had the agency followed the more logical step and engaged in clarification exchanges, the Protesters would have had a greater likelihood of receiving contract awards because their initial proposals were compliant and all but one of their proposed prices were in the lower half of the fifty-five offers. See Def. Demonstrative 1 (highlighting awardees' prices amid all proposed prices). As it is, the Army's

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round of discussions opens the door for all offerors to revise their proposals and prices such that they ***107** become more competitive. The Court is capable of fashioning relief to address this competitive injury. Therefore, the Protesters have established prejudice.

D. The Protesters are Entitled to Relief

The Protesters seek both declaratory relief and a permanent injunction on the Army's corrective action. The Court may award "any relief that [it] considers proper, including declaratory and injunctive relief." 28 U.S.C. § 1491(b)(2). First, the Court grants declaratory relief for the reasons stated above. The Court finds the Army's contemplated corrective action manifestly overbroad, and therefore irrational and unlawful.

[27] **[28]** Second, the Court grants the Protesters' request for a permanent injunction. A court may grant injunctive relief if "(1) the plaintiff has succeeded on the merits, (2) the plaintiff will suffer irreparable harm if the court withholds injunctive relief, (3) the balance of hardships to the respective parties favors the grant of injunctive relief, and (4) the public interest is served by a grant of injunctive relief." Centech Grp., Inc. v. United States, 554 F.3d 1029, 1037 (Fed. Cir. 2009) (citation omitted). Here, the Protesters have succeeded on the merits. Second, the Court finds that the Protesters would suffer irreparable harm if the court withholds injunctive relief. The Protesters would be forced to recompete wholesale for contracts they have already won. Further, as in Sheridan, discussions would also force the Protesters to bid against their own prices. See 95 Fed.Cl. at 155.

[29] The Court also finds that the balance of hardships favors the Protesters here. The Government would suffer some hardship if it decided to engage in more limited clarification exchanges, as this would require more effort on top of the effort already expended in drafting its ENs. Still, in fashioning its clarification questions, the Government would be free to look to offerors who stand a realistic chance of receiving an award after clarifications; in other words, the Army would not need to review every single proposal anew, as it would if it followed its current corrective action plan. [6] In contrast, the Protesters would face an elevated risk of losing their awards if the Army were to conduct discussions. Thus, the balance of hardships favors the Protesters.

[30] Finally, the public interest favors granting injunctive relief here. Corrective action is something the judicial system should and does encourage. Still, allowing an agency to respond disproportionately to minor procurement errors harms the integrity of the procurement system because it introduces an unfair and unanticipated additional layer of competition to a procurement. Agencies have broad discretion to institute corrective action, but offerors should be secure in the knowledge that any corrective action an agency implements will narrowly target the procurement defects the agency has identified. Finally, enjoining the Army's current corrective action plan does not mean the Army cannot pursue more reasonable corrective action within the boundaries described above. Therefore, granting a permanent injunction is in the public interest in this case.

Conclusion

Plaintiffs and Plaintiff–Intervenors' cross-motions for judgment on the administrative record are GRANTED. Defendant and Defendant–Intervenors' motions for judgment on the administrative record are DENIED. Having found that the prerequisites for entering a permanent injunction are satisfied, the Court hereby permanently ENJOINS Defendant from conducting its proposed corrective action. The Clerk is directed to enter judgment for Plaintiffs and Plaintiff–Intervenors.

IT IS SO ORDERED.

All Citations

133 Fed.Cl. 92

Footnotes

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1 The Court issued this decision under seal on July 3, 2017, and invited the parties to submit proposed redactions of any proprietary, confidential, or other protected information on or before July 10, 2017. None of the parties proposed any redactions. Thus, the Court reissues the opinion in full.

2 References to "AR Tab ___" refer to tabs in the administrative record. All page numbers given use the pagination of the administrative record rather than that of individual documents within the record. Furthermore, the Solicitation was amended ten times in ways that are not relevant to this case. For ease of reference, the Court cites the first version (AR Tab 17).

3 The procurement concept of making award without discussions, even for a large dollar procurement, is not unreasonable when considering that the agency was acquiring commercial off-the-shelf equipment.

4 Courts have since maintained that the holding in Griffy's Landscape should be limited to clerical errors. See, e.g., C.W. Over & Sons, Inc. v. United States, 54 Fed.Cl. 514, 521 n.10 (2002). In citing Griffy's Landscape here, the Court does not disturb their conclusion, as the errors many of the offerors made here were clerical.

5 Disclosure of the awardees' winning prices here was lawful. See Wildflower Int'l, Ltd. v. United States, 105 Fed.Cl. 362, 391 (2012). Allowing wholesale price revisions without any record support was not. Neither the MFR nor the rest of the administrative record provide support for allowing price revisions. The MFR states merely that "[a]llowing Offerors to change price would also benefit the Agency by getting offers that are a better value to the Government." While true, this statement on its face does not provide a rational basis for soliciting new prices. See, e.g., WHR Grp., Inc. v. United States, 115 Fed.Cl. 386, 398 (2014) ("[T]he contracting officer's bald assertions in the notes to file will not suffice because the agency failed to examine the relevant data and articulate a coherent and reasonable explanation for their decision.") (citation omitted).

6 Moreover, counsel for the Government indicated at oral argument that it would be "a very easy fix" to craft more narrowly-targeted corrective action if the Court were to find the Army's current corrective action plan too broad. See Oral Arg. Tr. at 74.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by SAGAM Securite Senegal v. United States, Fed.Cl., June 25, 2021

906 F.3d 982
United States Court of Appeals, Federal Circuit.

DELL FEDERAL SYSTEMS, L.P., Blue Tech Inc., Red River Computer Company, Inc., Plaintiffs-Appellees
Iron Bow Technologies, LLC, Govsmart, Inc., Ideal System Solutions, Inc., NCS Technologies, Inc., Plaintiffs
v.
UNITED STATES, HPI Federal, LLC, CDW Government LLC, Defendants-Appellants
Alphasix Corporation, Insight Public Sector, Inc., Integration Technolgy Groups, Inc., Sterling Computers Corporation, Defendants

2017-2516, 2017-2535, 2017-2554
|
Sealed Opinion Issued: September 24, 2018
|
Public Opinion Issued: October 5, 2018 *

Synopsis

Background: Awardees of commercial off-the-shelf (COTS) computer hardware contract with Army filed bid protests seeking declaratory and injunctive relief and challenging Army's decision to take corrective action by reopening procurement, requesting revised proposals, holding post-award discussions, and issuing new award decisions, after multiple previous administrative protests filed at Government Accountability Office (GAO), determining that Army was obligated to conduct discussions with bidders prior to award of contracts unless Army had reasonable basis for not doing so. Other awardees and disappointed bidders intervened, and protests were consolidated. The United States Court of Federal Claims, Nos. 1:17-cv-00465-TCW, 1:17-cv-00473-TCW, Thomas C. Wheeler, J., 133 Fed.Cl. 92, granted judgment on administrative record to plaintiff awardees, and appeals were taken.

Holdings: The Court of Appeals, Wallach, Circuit Judge, held that:

[1] Court of Federal Claims had jurisdiction over bid protests;

[2] rational basis review, rather than narrowly targeted standard, applied to Army's proposed corrective action;

[3] Army's proposed corrective action was rationally related to procurement defect;

[4] reasonableness inquiry was not different in pre-award versus post-award context;

[5] Army's release of all pricing to maintain fairness in corrective action rebidding had rational basis in light of defective procurement;

[6] Army rationally chose discussions, rather than clarifications, for all offerors as appropriate corrective action; and

[7] to ameliorate defective solicitation, Army was not required to address every option, but rather to provide reasonable corrective action and adequately explain its reasoning for doing so.

Reversed.

Procedural Posture(s): Review of Administrative Decision.

West Headnotes (18)

[1] **Federal Courts** Judgment

The determination by the Court of Federal Claims on the legal issue of the government's conduct, in a grant of judgment upon the administrative record, is reviewed without deference.

[2] **Public Contracts** Scope of review
United States Scope of review

Protests of agency procurement decisions are reviewed under the standards set forth in the Administrative Procedure Act (APA). 5 U.S.C.A. §§ 551, 559, 701, 706, 1305,

3105, 3344, 4301, 5335, 5372, 7521; 28 U.S.C.A. § 1491(b)(4).

15 Cases that cite this headnote

[3] **Injunction** Award of contract; bids and bidders

To grant injunctive relief in evaluating a bid protest case, the Court of Federal Claims must consider whether (1) the plaintiff has succeeded on the merits, (2) the plaintiff will suffer irreparable harm if the court withholds injunctive relief, (3) the balance of hardships to the respective parties favors the grant of injunctive relief, and (4) the public interest is served by a grant of injunctive relief. 28 U.S.C.A. § 1491(b)(2).

16 Cases that cite this headnote

[4] **Federal Courts** Injunction

The Court of Appeals gives deference to the Court of Federal Claims' decision to grant or deny injunctive relief, only disturbing the court's decision if it abused its discretion. 28 U.S.C.A. § 1491(b)(2).

4 Cases that cite this headnote

[5] **Federal Courts** Abuse of discretion in general

An abuse of discretion exists where the Court of Federal Claims made a clear error of judgment in weighing the relevant factors or exercised its discretion based on an error of law or clearly erroneous fact finding.

[6] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Court of Federal Claims had jurisdiction over bid protests by awardees of commercial off-the-shelf (COTS) computer hardware contract with Army, seeking declaratory and injunctive relief and challenging Army's decision to take corrective action by reopening procurement, requesting revised proposals, holding post-award discussions, and issuing new award decisions, since awardees were interested parties that bid on solicitation and alleged violations of federal acquisition regulation (FAR) and Defense Federal Acquisition Regulations Supplement (DFARS). 28 U.S.C.A. § 1491(b)(1).

1 Cases that cite this headnote

[7] **Public Contracts** Scope of review

United States Scope of review

Rational basis review, rather than narrowly targeted standard, applied to Army's proposed corrective action of opening discussions with all remaining offerors, including those who filed protests, requesting final revised proposals, and issuing new award decision to address procurement defects of not addressing ambiguities in equipment submission form spreadsheet template and business process form template and not conducting pre-award discussions for $5 billion solicitation for commercial off-the-shelf (COTS) computer hardware; although standard of review and conclusions were framed in terms of rationality and reasonableness, Court of Federal Claims asked whether selected remedy was as narrowly targeted as possible to identified error in bidding process which required more than finding of rationality or reasonableness. 5 U.S.C.A. § 706(2)(A).

5 Cases that cite this headnote

[8] **Public Contracts** Reconsideration

United States Reconsideration

Corrective action on a government contract only requires a rational basis for its implementation. 5 U.S.C.A. § 706(2)(A).

16 Cases that cite this headnote

[9] **Public Contracts** Scope of review

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United States Scope of review

On review of corrective action on a government contract, the rational basis test asks whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion. 5 U.S.C.A. § 706(2)(A).

30 Cases that cite this headnote

[10] **Federal Courts** Questions of Law in General

When determining whether a court committed legal error in selecting the appropriate legal standard, the Court of Appeals determines which legal standard the tribunal applied, not which standard it recited.

[11] **Public Contracts** Reconsideration

United States Reconsideration

Army's proposed corrective action of opening discussions with all remaining offerors, including those who filed protests, requesting final revised proposals, and issuing new award decision was rationally related to procurement defects of not addressing ambiguities in equipment submission form spreadsheet template and business process form template and not conducting pre-award discussions for $5 billion solicitation for commercial off-the-shelf (COTS) computer hardware, since defects were highly material in that majority of offerors were disqualified due to their submission of technically unacceptable offers, clarifications could not be used to correct material proposal mistakes, and corrective action allowed offerors to propose compliant equipment and modify prices accordingly. 5 U.S.C.A. § 706(2)(A); 48 C.F.R. §§ 15.306(a)(1)–(2), 215.306(c)(1), 15.306(d)(3).

7 Cases that cite this headnote

[12] **Public Contracts** Bidding and Bid Protests

United States Bidding and Bid Protests

On a government contract, a federal agency is bound by the applicable procurement statutes and regulations.

4 Cases that cite this headnote

[13] **Administrative Law and Procedure** Discretion of agency; abuse of discretion

The Court of Appeals affords great discretion to a reasonable agency decision.

4 Cases that cite this headnote

[14] **Public Contracts** Scope of review

United States Scope of review

Although procurement defects of not addressing ambiguities in equipment submission form spreadsheet template and business process form template and not conducting pre-award discussions for $5 billion solicitation for commercial off-the-shelf (COTS) computer hardware were identified after initial award decisions were made, rational basis review applied to Army's proposed corrective action of opening discussions with all remaining offerors, including those who filed protests, requesting final revised proposals, and issuing new award decision to address, since reasonableness inquiry was not different in pre-award versus post-award context. 5 U.S.C.A. § 706(2)(A).

1 Cases that cite this headnote

[15] **Public Contracts** Good faith; fairness

United States Good faith; fairness

Army's release of all pricing for commercial off-the-shelf (COTS) computer hardware under lowest priced, technically acceptable format to maintain fairness in corrective action rebidding had rational basis in light of defective procurement, despite its anti-competitiveness, since government provided reasonable explanation for its actions, and playing field had to be leveled so that successful offerors who did not propose lowest price had opportunity to revise their proposals to

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fairly compete during rebidding process. 5 U.S.C.A. § 706(2)(A); 48 C.F.R. § 15.506.

6 Cases that cite this headnote

[16] **Public Contracts** Evaluation process

United States Evaluation process

On a government contract, clarifications are not to be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. 48 C.F.R. § 15.306(a)(1)–(2).

7 Cases that cite this headnote

[17] **Public Contracts** Reconsideration

United States Reconsideration

Army rationally chose discussions, rather than clarifications, for all offerors as appropriate corrective action from likely violation of regulation that resulted in material errors of not addressing ambiguities in equipment submission form spreadsheet template and business process form template and not conducting pre-award discussions for $5 billion solicitation for commercial off-the-shelf (COTS) computer hardware, particularly where solicitation had requirement to include, should Army decide to open discussions, "all proposals, to include small business proposals previously removed for unacceptability." 5 U.S.C.A. § 706(2)(A); 48 C.F.R. § 15.306(a)(1)–(2).

5 Cases that cite this headnote

[18] **Public Contracts** Reconsideration

United States Reconsideration

To ameliorate defective solicitation, Army was not required to address every option, but rather to provide reasonable corrective action and adequately explain its reasoning for doing so; therefore, Court of Appeals could not substitute its judgment for that of Army by determining whether there was another, perhaps preferable solution. 5 U.S.C.A. § 706(2)(A).

3 Cases that cite this headnote

***985** Appeals from the United States Court of Federal Claims in Nos. 1:17-cv-00465-TCW, 1:17-cv-00473-TCW, Judge Thomas C. Wheeler.

Attorneys and Law Firms

Catherine Emily Stetson, Hogan Lovells US LLP, Washington, DC, argued for all plaintiffs-appellees. Plaintiff-appellee Dell Federal Systems, L.P. also represented by Michael F. Mason, Thomas Pettit, Christine Alice Reynolds.

Joseph Ashman, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellant United States. Also represented by Martin F. Hockey, Jr., Robert Edward Kirschman, Jr., Chad A. Readler; Elinor Kim, Contract and Fiscal Law Division, United States Army Legal Services Agency, Fort Belvoir, VA.

Jonathan Michael Baker, Crowell & Moring, LLP, Washington, DC, argued for defendant-appellant HPI Federal, LLC. Also represented by Daniel Ruben Forman, Elizabeth Ann Buehler, Robert Joseph Sneckenberg.

Michael J. Anstett, Fried, Frank, Harris, Shriver & Jacobson LLP, Washington, DC, for plaintiff-appellee Blue Tech Inc. Also represented by James J. McCullough, Brendan Connolly McNamara, Neaha P. Raol.

Gregory R. Hallmark, Holland & Knight, LLP, McLean, VA, for plaintiff-appellee Red River Computer Company, Inc. Also represented by Elizabeth Jochum, Tysons, VA; Rodney Mitchell Perry, Washington, DC.

David Michael Nadler, Blank Rome LLP, Washington, DC, for defendant-appellant CDW Government LLC.

Before Moore, Schall, and Wallach, Circuit Judges.

Opinion

Wallach, Circuit Judge.

***986** After initially awarding a contract for computer hardware to original awardees including Dell Federal Systems, L.P. ("Dell"), Blue Tech, Inc. ("Blue Tech"), and Red River Computer Company ("Red River") (collectively,

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"Appellees"), the U.S. Department of the Army ("the Army") instituted a corrective action [1] to reopen procurement and conduct additional discussions with offerors. J.A. 7009 (Corrective Action). Appellees challenged the decision to institute corrective action before the U.S. Court of Federal Claims, which granted Appellees' cross-motions for judgment on the administrative record and permanently enjoined the Army from proceeding with its corrective action. *See* *Dell Fed. Sys., L.P. v. United States*, 133 Fed.Cl. 92, 107 (2017); *see also* J.A. 1 (Judgment).

Appellants HPI Federal, LLC ("HPI"), CDW Government, LLC ("CDW"), and the United States ("the Government") (collectively, "Appellants") appeal the opinion and order of the Court of Federal Claims. We possess jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) (2012). Because the Court of Federal Claims did not apply the proper legal standard and we determine the Army's corrective action was reasonable under that standard, we reverse.

BACKGROUND

I. The Solicitation

In May 2016, the Army solicited proposals for indefinite-delivery, indefinite-quantity contracts for "commercial-off-the-shelf" computer hardware such as desktop computers, tablet computers, and printers under Solicitation No. W52P1J-15-R-0122 ("the Solicitation"). J.A. 1341; *see* J.A. 1339–87. The total estimated contract value was $5 billion over a ten-year period. J.A. 1341. While the Army anticipated "mak[ing] at least eight [contract] awards, with up to five reserved for small business[es]," J.A. 1341, the Solicitation left open the possibility that "the [Army] ... may make as many, or as few, awards as deemed appropriate," J.A. 1384.

The Solicitation stated that the competition would be conducted in accordance with the procedures outlined in Federal Acquisition Regulations ("FAR") Part 15, "Contracting by Negotiation," and the Army would therefore award contracts to the lowest priced, technically acceptable offerors. J.A. 1384; *see* FAR 15.101-2(a) (2015) (explaining that the "lowest price technically acceptable source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price"). The Solicitation further stated offerors would be evaluated based on "an integrated assessment of three evaluation factors" of "Technical Approach, Past Performance, and Price," and any ***987** relevant attendant sub-factors. J.A. 1385. To be considered for an award, the Solicitation required offerors to achieve an " 'Acceptable' [rating] ... for the Technical Approach and its two sub-factors and the Past Performance [f]actor." J.A. 1385. For the two Technical Approach sub-factors, offerors were required to complete an attached "Equipment Submission Form" and "Business Process Form" in Microsoft Excel. J.A. 1381–82; *see, e.g.*, J.A. 1388–421 (Equipment Submission Form spreadsheet template), 1422–25 (Business Process Form spreadsheet template). For the Equipment Submission Form, offerors were instructed to "complete all cell entries" and "identify the Original Equipment Manufacturer (OEM) [ ] model and salient characteristics of each proposed item," and were advised that "[a]n incomplete or blank entry will indicate that the proposed item does NOT meet minimum requirements." J.A. 1382.

To evaluate the offerors' bids, the Army's evaluation team consisted of a Source Selection Authority ("SSA"), a Source Selection Evaluation Board ("SSEB"), and a Procuring Contracting Officer ("CO"). J.A. 1303. The SSEB would "review and evaluat[e] ... proposals against the [S]olicitation requirements and the approved evaluation criteria," J.A. 1307, and document their evaluation results in a Source Section Decision Document report, J.A. 5573. Based upon that report, the SSA would either "[m]ake a determination to award without discussions or enter into discussions" and make "the final source selection decision ... before contracts [were] awarded or announced." J.A. 1304.

The Army reserved the right "to conduct discussions and to permit [o]fferors to revise proposals if determined necessary by the [CO]." J.A. 1379; *see* J.A. 1468 (stating, in an amendment to the Solicitation, "the [Army] intends to award without conducting discussions"); *see also* FAR 15.306(d) (defining discussions as exchanges "undertaken with the intent of allowing the offeror to revise its proposal"). The Solicitation further explained that "[i]f discussions are opened, all proposals, to include small business proposals previously removed for unacceptability[,] ... will be included. After discussions are closed and final proposal revision[s] are received, the [Army] will separate proposals, re-list[,] and evaluate" in accordance with the procedures for the competition categories, i.e., full and open competition category, and reserved small business category. J.A. 1384.

II. Source Selection and Award

The Army received fifty-eight proposals, with fifty-two from small businesses. J.A. 5574. Three proposals were rejected as non-responsive, and of the fifty-five proposals that were evaluated, nine were deemed acceptable for the Technical Approach and Past Performance evaluation factors, *see* J.A. 5574; *see also* J.A. 5575–77 (detailing each party's rating for each evaluation factor), with all nine final prices found to be fair and reasonable, *see* J.A. 5579–80. The SSEB said it did "not have a meaningful reason to open discussions" with offerors because doing so "would significantly delay award." J.A. 5534. In February 2017, the Army awarded nine contracts: five contracts under the small business category, including to Blue Tech and Red River, and four under the full and open competition category, including to Dell. J.A. 5573, 5580; *see* J.A. 5579 (identifying which awardees relate to each category).

III. Post-Award Protests and the Army's Corrective Action

Following the award decision, HPI, CDW, and nineteen other unsuccessful offerors ***988** filed protests at the U.S. Government Accountability Office ("GAO"). *See, e.g.*, J.A. 6296–305 (CDW's GAO protest), 6346–427 (HPI's GAO protest). An Army memorandum for record ("MFR"), inter alia, summarizes how the "primary protest allegations" protested the Army's evaluations as unreasonable because the proposal deficiencies the Army considered disqualifying were minor or "clerical errors and misunderstandings" resulting from Solicitation ambiguities that could have been resolved through clarifications as defined in FAR 15.306(a)(2).[2] J.A. 7019; *see, e.g.*, J.A. 6033, 6297. Several protests also argued that the Army should have engaged in discussions with offerors to resolve these spreadsheet-related misunderstandings, as required by Defense Federal Acquisition Regulations Supplement ("DFARS") 215.306(c),[3] and to resolve claimed misunderstandings relating to the completion of the Excel spreadsheets. *See, e.g.*, J.A. 6367–69; *see also* DFARS 215.306(c)(1) ("For acquisitions with an estimated value of $100 million or more, contracting officers *should* conduct discussions." (emphasis added)).

In response to the GAO protest, the Army conducted an internal review, *see* J.A. 7018, and issued its Notice of Corrective Action, informing GAO that it had decided "that it would be in the Army's best interest to take corrective action to resolve *all* the protests," J.A. 7009 (emphasis added). The Army stated that such corrective action would "consist of the following: (1) opening discussions with all of the remaining offerors, including those who filed protests, (2) requesting final revised proposals, and (3) issuing a new award decision." J.A. 7009.

The Army also released its MFR documenting its rationale for proposing corrective action in light of the GAO protests. *See* J.A. 7018–21 (MFR). First, the CO explained how the Army's counsel found that because the procurement was valued in excess of $100 million, the Army was likely required to conduct discussions with offerors pursuant to DFARS 215.306(c)(1). *See* J.A. 7018–19 (explaining that the SSEB's reasoning of award delay did not constitute a reasonable basis for forgoing discussions); *see also* J.A. 5534 (providing the SSEB's reasoning). Second, counsel found that there was "ambiguity in the requirements or the [Army's] instructions [on] how to fill out the [Equipment Submission Form and Business Process Form Microsoft Excel] spreadsheet[s]," which "could have easily and quickly been resolved" before award and could have been addressed in discussions. J.A. 7020; *see* J.A. 7020 (stating many of the "Unacceptable" ratings were "merely compliance issues with filling out the form rather than a deficiency in the item proposed"). The Army summarized two representative examples of the ambiguities: (1) the presence of a thick, black line "hard-line" in the Equipment Submission Form spreadsheet between the hard-drive and solid-state drive requirements; and (2) the conflicting instructions that "an upgrade [to a base model] *must* be an increase in capability" and "that selection of an item in a drop-down [menu] is acceptable when there are ***989** items in the drop-down that are not upgrades to a base model." J.A. 7020; *see, e.g.*, J.A. 386 (depicting the hardline). Ultimately, Army's counsel recommended that "[d]ue to the significant litigation risk, the ambiguities in the spreadsheet ..., and a matter of policy to do what is right, ... [the Army] take limited corrective action to resolve the issues with Offerors' Technical Proposals." J.A. 7021.

As a result of the Army's proposed corrective action, the GAO dismissed the unsuccessful offerors' protests as moot. *See* J.A. 7022–23. The Army subsequently notified offerors that "[d]iscussions with all offerors in the competitive range are now open" and invited offerors to present their "best and final proposal," J.A. 7047 (letter to originally successful offeror), and the Army advised originally unsuccessful offerors to

"address the deficiencies in [their] proposal[s]," J.A. 7076, and to revise their final prices "to their best and final prices," J.A. 7077. In addition, "to remedy [any] potential competitive [dis]advantage" to offerors whose prices were disclosed by the original award notice, the Army sent all offerors a Microsoft Excel spreadsheet of the final proposed prices, with offerors not identified. J.A. 7378; *see* J.A. 7379–80 (listing prices).

IV. The Relevant Proceedings

Two of the nine initial awardees, specifically Dell and Blue Tech, sued the Government in the Court of Federal Claims, seeking to enjoin the Army's corrective action, *see* J.A. 290, and five other initial awardees, including Red River, joined as intervenors, *Dell*, 133 Fed.Cl. at 100.[4] The cases were consolidated. *Id.* The Appellees then sought a permanent injunction, arguing that the corrective action was unlawful, and the proposed corrective action to reopen the competition was not reasonable under the circumstances. *See id.*[5]

In its Opinion and Order, the Court of Federal Claims granted the Appellees' request for declaratory relief and a permanent injunction of the Army's corrective action. *Id.* at 107; *see id.* at 104–07 (analyzing the four-pronged test for injunctive relief in favor of Appellees); *see Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009) (outlining the four-pronged permanent injunction test as (1) success on the merits, (2) irreparable harm, (3) the balance of hardships, and (4) the public interest). As to success on the merits, the Court of Federal Claims determined that, while it agreed that the Army had rationally identified procurement defects, the "Army's contemplated corrective action [wa]s overbroad." *Dell*, 133 Fed.Cl. at 104 (capitalization modified); *see id.* (noting that "the Army rationally identified two procurement defects": (1) "ambiguities in the Equipment Submission Form" and (2) "the Army's failure to hold discussions"); *id.* at 104 (stating that "[e]ven where an agency has rationally identified defects in its procurement, its corrective action must narrowly target the defects it is intended to remedy" (internal quotation marks and citation omitted)), 106 (holding that the Army's corrective action "is not rationally related to any procurement defects"). The Court of Federal Claims also found all three other prongs of the permanent injunction test weighed in favor of ***990** Appellees, *id.* at 107, and therefore entered a permanent injunction, J.A. 1.[6]

DISCUSSION

On appeal, Appellants contend that we should reverse the Court of Federal Claims' grant of a permanent injunction because (1) the Court of Federal Claims applied the wrong standard in considering success on the merits because it assessed whether the Army's proposed corrective action was "narrowly targeted" to remedy a procurement defect, Gov't's Br. 21,[7] and (2) under the proper legal framework, "the Army's corrective action is rationally related to the procurement defect," *id.* at 26 (capitalization modified). We begin with the governing standards and then address Appellants' arguments in turn.

I. Standard of Review and Legal Standard

[1] **[2]** We review "the [Court of Federal Claims'] determination on the legal issue of the government's conduct, in a grant of judgment upon the administrative record, without deference." *Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1309 (Fed. Cir. 2016) (citation omitted). We review "[p]rotests of agency procurement decisions ... under the standards set forth in the Administrative Procedure Act ('APA')." *Id.* (citing 28 U.S.C. § 1491(b)(4)); *see* APA, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012). The APA provides that "a reviewing court shall set aside the agency action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Croman Corp. v. United States*, 724 F.3d 1357, 1363 (Fed. Cir. 2013) (internal quotation marks and citation omitted); *see* 5 U.S.C. § 706(2)(A). We have held that "[u]nder [the APA] standards, a reviewing court may set aside a procurement action," such as a corrective action, "if (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." *Centech Grp.*, 554 F.3d at 1037 (internal quotation marks and citation omitted); *see id.* at 1036–37 (treating a corrective action as a type of procurement action).

[3] **[4]** **[5]** **[6]** In evaluating a bid protest case, the Court of Federal Claims "may award any relief that the court considers proper, including declaratory and *injunctive relief*." 28 U.S.C. § 1491(b)(2) (emphasis added). To grant injunctive relief, the Court of Federal Claims "must consider whether (1) the plaintiff has succeeded on the merits, (2) the plaintiff will suffer irreparable harm if the court withholds injunctive relief, (3) the balance of hardships to the respective parties favors the grant of injunctive relief, and (4) the public interest ***991** is served by a grant of injunctive relief." *Centech Grp.*, 554 F.3d at 1037 (citation omitted). "We give deference to the Court of Federal Claims' decision to grant or deny injunctive relief, only disturbing the court's decision if it abused its discretion." *PGBA, LLC v. United States*, 389 F.3d 1219, 1223 (Fed. Cir. 2004) (citation omitted). An abuse of discretion exists where the Court of Federal Claims "made a clear error of judgment in weighing the relevant factors or exercised its discretion based on an error of law or clearly erroneous fact finding." *Id.* (internal quotation marks and citation omitted). [8]

II. Injunctive Relief

A. The Court of Federal Claims Abused Its Discretion in Granting a Permanent Injunction Because It Improperly Assessed the Success on the Merits Prong

[7] The Court of Federal Claims summarized the question before it as "whether holding post-award discussions is a rational remedy for failing to hold pre-award discussions." *Dell*, 133 Fed.Cl. at 105. It held that "the Army's corrective action is not rationally related to any procurement defects." *Id.* at 106. However, in so holding, the Court of Federal Claims applied a heightened standard, requiring that a reasonable "corrective action must narrowly target the defects it is intended to remedy." *Id.* at 104 (internal quotation marks and citation omitted). The Court of Federal Claims thus enjoined the corrective action because it felt there was "a more narrowly targeted post-award solution that the Army entirely failed to consider: clarifications and reevaluation." *Id.* at 105. Appellants argue that the Court of Federal Claims erred in determining that Appellees had demonstrated success on the merits by employing an incorrect standard. *See* Gov't's Br. 21–22; *see also* *Dell*, 133 Fed.Cl. at 107. Specifically, Appellants argue that the Court of Federal Claims applied a "more exacting [standard] than the APA's 'rational basis' review threshold for procurement protests, and impermissibly restrict[ed] the great deference the Tucker Act requires courts to afford agency procurement officials" by its use of a "narrowly targeted" standard. Gov't's Br. 22. We agree with Appellants.

[8] The Court of Federal Claims based its decision on an error of law because corrective action only requires a rational basis for its implementation. Although the Court of Federal Claims has previously and occasionally employed a "narrow targeting" test to evaluate the appropriateness of a corrective action, *see, e.g.*, *Amazon Web Servs., Inc. v. United States*, 113 Fed.Cl. 102, 115 (2013) (employing, by the ***992** same Court of Federal Claims judge, "narrowly target" language when reviewing a corrective action), "the Court of Federal Claims must follow relevant decisions of the Supreme Court and the Federal Circuit, not the other way around," *Dellew*, 855 F.3d at 1382 (footnote omitted). We have never adopted this heightened "narrowly targeted" standard, as both parties concede. *See* Oral Arg. at 1:26–46, 21:06–19, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2017-2516.mp3.

[9] Instead, we have consistently reviewed agencies' corrective actions under the APA's "highly deferential" "rational basis" standard. *Croman*, 724 F.3d at 1363 (internal quotation marks and citation omitted); *see id.* at 1367 (affirming the Court of Federal Claims' grant of summary judgment in favor of the Government where the agency's corrective action "decisions were rationally based and not contrary to law"); *see, e.g.*, *Raytheon Co. v. United States*, 809 F.3d 590, 595 (Fed. Cir. 2015) (explaining that, "for us to uphold the [agency's] decision to reopen the bidding process, it is sufficient ... that the grounds relied on by the [agency] ... *rationally* justified the reopening under governing law" (emphasis added)); *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 938 (Fed. Cir. 2007) (affirming Court of Federal Claims' inquiry, which considered the "reasonableness of the Government's ... proposed corrective action"). [9] The rational basis test asks "whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion." *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (internal quotation marks and

citation omitted); *see* *id.* at 1355–56 (upholding a "best value" award decision and finding a procurement official acted "within the scope of [his] discretion" in making "a reasonable judgment" to weigh equally a solicitation's "price and technical factors" despite "the solicitation's silence regarding the relationship between the [two]" because "the additional cost of [an unsuccessful bidder's] proposal would not offset its strong technical evaluation").

[10] When determining whether a court committed legal error in selecting the appropriate legal standard, we determine which legal standard the tribunal *applied*, not which standard it recited. *See Int'l Custom Prods., Inc. v. United States*, 843 F.3d 1355, 1359 (Fed. Cir. 2016) (stating that "a single *reference* to an incorrect legal standard does not undermine a final decision, only its *application* does" and holding that, despite referencing an incorrect legal standard, the court under review did not err because it "repeatedly *applied* the correct ... standard"). Here, although the Court of Federal Claims framed its standard of review and conclusions in terms of rationality and reasonableness, *see* *Dell*, 133 Fed.Cl. at 101, 105, 106, it actually *applied* a heightened "narrowly targeted" standard, *see* *id.* at 105–06 (performing a fact-intensive analysis under a heightened "narrowly targeted" review of the Army's corrective action, and finding "there is a more narrowly targeted post-award ***993** solution that the Army entirely failed to consider[,] clarifications and reevaluation" "of proposals as a more natural expedient for the minor clerical errors it had identified"). Asking whether a selected remedy is as narrowly targeted as possible to an identified error in the bidding process requires more than a finding of rationality or reasonableness; therefore, the Court of Federal Claims improperly applied an overly stringent test for corrective action. *Cf.* *Ala. Aircraft Indus., Inc.-Birmingham v. United States*, 586 F.3d 1372, 1376 (Fed. Cir. 2009) (reversing the Court of Federal Claims, where an agency made "a determination well within [its] discretion," but the Court of Federal Claims "attempt[ed] to rewrite the [request for proposals] ... in the manner the court preferred," such that it "went beyond the scope of the court's [APA] review[ ] and amounted to an impermissible substitution of the court's judgment for the agency's with regard to how the contract work should be designed").

This error is due in part to the Court of Federal Claims' improper reliance on its decision in *Amazon Web*. *See* *Dell*, 133 Fed.Cl. at 104. In *Amazon Web,* the Court of Federal Claims held that a corrective action was overbroad, explaining that "even where a protest is justified, any corrective action must narrowly target the defects it is intended to remedy." 113 Fed.Cl. at 115 (citation omitted). The Court of Federal Claims' reliance on *Amazon Web* is incorrect for two reasons. First, as we outlined above, the Court of Federal Claims gave greater weight to the defective legal standard as recited in *Amazon Web* than our holdings in *Chapman*, *Croman*, *Raytheon*, and *Banknote*. Federal Circuit precedent is "binding on this court as it is binding on the Court of Federal Claims." *Crowley v. United States*, 398 F.3d 1329, 1335 (Fed. Cir. 2005). Second, binding precedent aside, *Amazon Web*, in any event, is factually distinguishable. The defects in *Amazon Web* were associated with only the agency's evaluation process, *see* 113 Fed.Cl. at 109, 116, and not with the agency's original solicitation and proposals, as is the case here. Moreover, in *Amazon Web*, the Court of Federal Claims found no rational basis based upon the agency's lack of "a narrowly tailored" corrective action that sought to amend the Solicitation despite no alleged defects with the solicitation or proposals. *See* *id.* at 116. Here, we have both alleged and undisputed procurement defects, and unlike *Amazon Web*, the Army has not proposed changing its original requirements when reevaluating the offerors' proposals. For these reasons, the Court of Federal Claims improperly relied upon *Amazon Web* to find that the corrective action was not "narrowly targeted" and therefore overbroad and not reasonable.

We disagree with the Appellees' main counterargument that we should view the "narrowly targeted" requirement not as a heightened standard but rather as an application of the rational basis standard. *See* Blue Tech's Br. 24–25; Dell's Br. 16–19. Specifically, Appellees argue that corrective action cases are too "fact specific" for only one agreed-upon application of the legal standard, and they advocate a "reasonable under the circumstances" analysis. Blue Tech's Br. 24 (quoting *WHR Grp., Inc. v. United States*, 115 Fed.Cl. 386, 397 (2014)); *see* *id.* ("[G]iven the substantial differences ... from procurement to procurement, 'there can be no universal test as to what constitutes appropriate corrective action.' "); Dell's Br. 19–23 (similar); Red River's Br. 4 (referring

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to the tests as "two sides of the same coin"). Not only is *WHR Group* a decision of the Court of Federal Claims that is not binding on us, *Dellew*, 855 F.3d at 1382, but *WHR Group* does not ***994** support a "narrowly targeted" standard. Instead, *WHR Group* only references in passing various types of evidence used to prove whether the contracting agency had a rational basis for taking a corrective action, such as "a defect in a solicitation," a "legislative reduction of a program," or "legitimate budgetary needs." 115 Fed.Cl. at 397. Adopting the "narrowly targeted" standard would undermine our deferential APA review, which statutorily mandates that we determine "whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion." *Banknote*, 365 F.3d at 1351 (internal quotation marks and citation omitted). Because the heightened "narrowly targeted" standard finds no support in the statute or our precedent, we hold that the Court of Federal Claims erred in applying an incorrect legal standard to review the Army's corrective action.

B. The Army's Corrective Action Had a Rational Basis

[11] The Court of Federal Claims concluded, inter alia, that despite it being "reasonable" for the Army to "consider[ ] its failure to conduct discussions to be a procurement defect," the only time to have those discussions was *pre*-award, and therefore reopening procurement *post*-award was overbroad and improper.[10] *Dell*, 133 Fed.Cl. at 103; *see id.* at 106 (stating that "it was [not]rational for the Army to fail to consider [more narrowly tailored] clarifications and reevaluation of proposals as a more natural expedient for the minor clerical errors it had identified"), *id.* ("The Army instead opened wide-reaching discussions with all remaining offerors and allowed all offerors to submit modified proposals with new prices, despite having disclosed the [Appellees'] winning prices."). The Government argues that we should reverse the Court of Federal Claims' permanent injunction because the Army's corrective action to reopen procurement was in fact reasonably related to the Solicitation's procurement defects, J.A. 7009, both because such a corrective action is directly and reasonably related to its "likely violat[ion]" of DFARS 215.306(c)(1) by failing to conduct pre-award discussions for a high-valued solicitation, Gov't's Br. 26, and because "clarifications cannot be used to correct material proposal mistakes," *id.* at 30 (capitalization modified). We agree with the Government.

Reviewing the corrective action under the proper legal standard, we hold the Army's original notice of corrective action was reasonable, and through our reversal of the lower court's injunction, this is the corrective action we analyze and reinstate. *See* J.A. 7009 (Notice of Corrective Action). The Army's corrective action "consists of the following: (1) opening discussions with all of the remaining offerors, including those who filed protests, (2) requesting final revised proposals, and (3) ***995** issuing a new award decision." J.A. 7009. The Army's proposed corrective action to reopen procurement and allow proposals to be revised is rationally related to the procurement's defects, i.e., failure to conduct discussions and spreadsheet ambiguities. Spreadsheet ambiguities may not always require reopening the procurement process. *See* *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1322 (Fed. Cir. 2003) (explaining, for example, that "[r]ather than being 'for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes,' clarifications now provide offerors 'the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond)' "). However for the other expressly stated defect of failure to conduct discussions, the only way to conduct discussions as contemplated here is to reopen the procurement process to solicit revised proposals. *See* *id.* at 1321 ("[D]iscussions involve negotiations[and] may include 'bargaining,' which 'includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements ..., or other terms of a proposed contract. A[nd] unlike clarifications, discussions 'are undertaken with the intent of allowing the offeror to revise its proposal.' " (citations omitted)).

Contrary to the Court of Federal Claims' incorrect characterization of the identified spreadsheet defects as "relatively minor," we find that the identified defects in the Solicitation that led to "the majority of the offerors" being disqualified—due to their submission of technically unacceptable offers—were highly material. *Dell*, 133 Fed.Cl. at 104. An offeror's understanding of what computer equipment it may or may not propose is certainly material to this procurement for computer equipment and accessories. The offeror's computer equipment models are the primary

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technical elements upon which the offerors are being evaluated, *see* J.A. 1388–421, and the ambiguity pertained to filling out the Equipment Submission Form, which allows the offerors to identify their computer equipment, *see* J.A. 386, 7020. Correcting the solicitation ambiguity to allow the offerors to properly identify their equipment, therefore, goes well beyond omitted clerical information. [11]

[12] **[13]** Pursuant to the APA, an agency's actions must be "in accordance with law." 5 U.S.C. § 706(2)(A). Moreover, an agency is bound by the "applicable procurement statutes and regulations." *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365 (Fed. Cir. 1999); *see Blue & Gold Fleet, LP v. United States*, 70 Fed.Cl. 487, 512 (2006) ("An agency has no discretion regarding whether or not to follow applicable laws and regulations."), *aff'd*, 492 F.3d 1308 (Fed. Cir. 2007). Pursuant to DFARS 215.306(c)(1), "[f]or acquisitions with an estimated value of $100 million or more, contracting officers should conduct discussions." Therefore, discussions normally are to take place in these types of acquisitions. *See SAS Inst., Inc. v. Iancu*, —— U.S. ——, 138 S.Ct. 1348, 1354, 200 L.Ed.2d 695 (2018) ("The word 'shall' generally imposes a nondiscretionary duty."); *see also Johnson v. McDonald*, 762 F.3d 1362, 1365 (Fed. Cir. 2014) (interpreting a regulation by ascertaining its plain meaning). ***996** FAR 2.101 defines "should" to mean "an expected course of action or policy that is to be followed unless inappropriate for a particular circumstance," and the GAO has applied FAR 2.101 to interpret DFARS 215.306(c)(1). *See Sci. Applications Int'l Corp.* (*SAIC*), No. B-413501, 2016 WL 6892429, at *8 (Comp. Gen. Nov. 9, 2016) (finding, in a case of first impression by the GAO, that DFARS 215.306(c)(1) is reasonably read to mean that "discussions are *the expected course of action* in [Department of Defense] procurements valued over $100 million" (emphasis added)). Here, the total procurement is estimated at $5 billion, J.A. 1341, which clearly exceeds the $100 million threshold of DFARS 215.306(c)(1). While it is true that we afford great discretion to a reasonable agency decision, *see Turner Constr. Co. v. United States*, 645 F.3d 1377, 1381 (Fed. Cir. 2011) ("It is well settled that COs are given broad discretion in their evaluation of bids. When a[CO's] decision is reasonable, neither a court nor the GAO may substitute its judgment for that of the agency." (citations omitted)), as the Court of Federal Claims recognized, "it was rational for the Army" to determine that the decision "to forgo discussions" with at best "threadbare and conclusory" reasons likely "failed the reasonableness test articulated in *SAIC*," *Dell*, 133 Fed.Cl. at 104; *see* J.A. 7019–20 (citing J.A. 5534). Had the Army conducted pre-award discussions, several of the lower-priced offerors deemed unacceptable—either as a result of ambiguous Solicitation requirements or otherwise—might have revised their initial proposals, which then might plausibly have been found technically acceptable. Opening discussions with all offerors at this stage in the process, as coherently explained here by the Army, *see* J.A. 7019–20, is a reasonable vehicle to allow offerors to propose compliant equipment and modify prices accordingly, *see Banknote*, 365 F.3d at 1351. We determine that the corrective action of conducting discussions is rationally related to the undisputed procurement defect of originally failing to conduct pre-award discussions, as reasonably interpreted by the agency to be required by the applicable regulations, in the first instance. *See* J.A. 7019–20.

[14] The Appellees contend that the Army's decision to conduct discussions was an unreasonable corrective action, "even assuming the [Court of Federal Claims] applied the 'wrong standard.' " Blue Tech's Br. 27 (capitalization modified). Specifically, they argue the action was unreasonable because the defects were identified *after* the initial award decisions were made, in effect arguing that the reasonableness inquiry is different in the pre- and post-award context. *See id.* at 27–28 ("[T]he posture of this procurement is fundamentally different from what it would have been had the Army engaged in discussions *before* announcing nine of the offerors' proposed prices."); Dell's Br. 30 ("Even accepting that the Army should have held discussions *earlier* in the process, it does not follow that the proper remedy for that error is to hold far-reaching discussions *now*."); Red River's Br. 8 ("While failure to conduct pre-award discussions could be properly remedied by conducting discussions before the awards were announced and the awardees' prices disclosed, the same is not true in the post-award environment."). However, the Appellees cite no precedent, nor do we find any, to support the imposition of a pre- and post-award dichotomy in our reasonableness analysis for corrective action. Since opening discussions was a reasonable corrective action, *see supra*, pursuant to the express terms of the Solicitation, "[i]f discussions are opened, all proposals, to include small business proposals previously removed for unacceptability ... will be included,"

J.A. ***997** 1384. We do not disrupt on appeal the Army's adherence to the terms of the Solicitation in implementing its corrective action to open discussions. *See Croman*, 724 F.3d at 1363 (reviewing the agency's corrective action pursuant to a "highly deferential" standard (internal quotation marks and citation omitted)).

[15] While the Appellees take issue with alleged anti-competitiveness of the Army's release of all offerors' pricing in order to maintain fairness in the corrective action rebidding, *see* Blue Tech's Br. 28; Dell's Br. 31–32; Red River's Br. 5, this does not alter our analysis. Here, the relevant timeline of events lends itself to a unique procedural posture. After the Army notified all offerors of the award, it sent debriefing letters in February 2017 to the unsuccessful offerors "in accordance with FAR 15.506." J.A. 5949; *see, e.g.*, J.A. 5948–49 (Debriefing Letter to HPI). FAR 15.506 sets forth the required deadlines for "[p]ost[-]award debriefing of offerors" and provides that upon written request by any offeror "within 3 days after the date on which that offeror has received notification of contract award," *see* FAR 15.506(a)(1), an agency must, within five days, *see* FAR 15.506(a)(2), debrief said offerors as to, inter alia, the prices of the "*successful* offeror," FAR 15.506(d)(2); *see* FAR 15.506(d) (outlining the "minimum" required post-award debriefing information). However, in this case, a month later and after protests were filed at the GAO, as discussed *supra*, *see* Background Section III, the Army conceded that procurement defects occurred, and it decided to proceed with its corrective action to open discussions following GAO approval, *see* J.A. 7021 (MFR dated March 22, 2017). Then, on March 27, 2017, during the course of discussions and "[a]s part of the ... corrective action, the [Army] ... decided to release all offerors' total proposed prices in an effort to remedy the potential competitive advantage held by the offerors in the competition whose prices were not disclosed." J.A. 7378; *see* J.A. 7379–80 (listing total bid prices for all fifty-five offerors whose bids were deemed responsive).

We find no binding authority preventing, on the facts of this case, the release of the pricing information of all offerors. Moreover, we find that the Government provides a reasonable explanation for its actions. Under these circumstances, the Government concluded it would, upon rebidding, level the playing field for those successful offerors who did not propose the lowest price and now deserve a chance to revise their proposals to fairly compete during the rebidding process. *See* Oral Arg. at 8:54–9:51 (Q: "It seems that the Army ... decided in fairness that since [offerors] now have a target to shoot at—namely, they now know what the awardee listed for everything, so they know how to come in under it—[did] it seem[ ] only fair ... to list everyone else's [prices]?" A: "Yes, your Honor .... In this case, ... the initial awardees, they were not the lowest priced offerors. So, if the offerors who were not initially technically acceptable, they get a chance to revise their proposals, the initial awardees may likely be pushed out of the competition." Q: "When they did release all of the numbers that each person gave in the proposal, did they strip [the] name[s] of the proposer?" A: "That's right your Honor."). We find this to be reasonable action in light of a defective procurement, which the parties concede was defective. *See supra* n.10; *see also* Oral Arg. at 29:57–30:07 (conceding, by Dell's counsel, that "[w]e won the procurement submitting a technically acceptable offer, ... [but] to a defective procurement").

The FAR explains that, when conducting discussions, "[a]t a minimum, the [CO] ***998** must ... indicate to, or discuss with, each offeror still being considered for award, [inter alia,] deficiencies" in the offeror's proposal "to which the offeror has not yet had an opportunity to respond." FAR 15.306(d)(3). The Army only proposes to allow an offeror to "address deficiencies in [their] proposal" and "make revisions to correct the deficiencies listed" by the Army. J.A. 7097 (noting in letter opening discussions with offeror that "[i]f you make changes to areas of your technical proposal that have already been found acceptable, you are at risk of being found technically unacceptable"). Given these reasonable limitations, the corrective action has a rational basis.

[16] **[17]** Nevertheless, the Appellees maintain that clarifications are the only reasonable corrective action. *See, e.g.*, Dell's Br. 29, 31. However, requests for clarifications are "limited exchanges," designed to "clarify certain aspects of proposals" or "resolve minor or clerical errors" in the offerors' proposals. FAR 15.306(a)(1)–(2). "Clarifications are not to be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal." *JWK Int'l Corp. v. United States*, 52 Fed.Cl. 650, 661 (2002) (brackets and citation omitted), *aff'd*, 56 F. App'x 474 (Fed. Cir. 2003). As discussed above, the errors caused by the ambiguities in the Equipment Submission Form were material, rather than minor or clerical. The Court of Federal Claims acknowledged as much when it stated that while "many of the losing offerors in this procurement made minor or clerical errors" allegedly capable of correction through clarifications, *Dell*, 133

Fed.Cl. at 105, there were offerors that made "more wide-reaching errors" that were not capable of correction via clarification, *id.* at 106. Thus, the Army rationally chose discussions, rather than clarifications, for all offerors as the appropriate corrective action to address these material errors, especially due to the Solicitation's requirement to include, *should* the Army decide to open discussions, "all proposals, to include small business proposals previously removed for unacceptability." *See* J.A. 1384; *Alfa*, 175 F.3d at 1368 (holding that an "agency is strictly bound by [the] terms" of the standards set out in the *solicitation*). [12]

[18] Finally, Appellees argue that the Army's failure to consider other "[m]ore [l]imited" corrective actions is arbitrary and capricious. Dell's Br. 33. The Army was not legally required to address every option, but rather to provide a reasonable corrective action and adequately explain its reasoning for doing so. *See* *Chapman*, 490 F.3d at 938. The Army rationally decided to ameliorate a defective solicitation by re-opening the procurement, following the applicable regulation, and engaging in discussions to award new contracts. Even if we agreed with Appellees that the Army had other, better options available, we nevertheless ***999** conclude that the option it chose was reasonable, and we therefore refuse to "substitute [our] judgment" for that of the Army by determining whether there was another, perhaps preferable solution. *See* *R & W Flammann GmbH v. United States*, 339 F.3d 1320, 1322 (Fed. Cir. 2003) ("[W]hen an officer[']s decision is reasonable a court may not substitute its judgment for that of the agency.").

Accordingly, we hold that the original corrective action was rationally related to the procurement defect and that the Court of Federal Claims abused its discretion in finding that Appellees demonstrated, inter alia, success on the merits. Because proving success on the merits is a necessary element for a permanent injunction, [13] we reverse the Court of Federal Claims' grant of an injunction. The Army may proceed with its proposed corrective action, which we hereby reinstate.

CONCLUSION

We have considered the parties' remaining arguments and find them unpersuasive. Accordingly, the Judgment of the U.S. Court of Federal Claims is

REVERSED

All Citations

906 F.3d 982

Footnotes

* This opinion was originally filed under seal and has been unsealed in full.

1 A "corrective action in the bid protest context" is an "agency action, usually taken after a protest has been initiated, to correct a perceived prior error in the procurement process, or, in the absence of error, to act to improve the competitive process." *Dellew Corp. v. United States*, 855 F.3d 1375, 1378 n.2 (Fed. Cir. 2017) (internal quotation marks and citation omitted).

2 Clarifications "are limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated." FAR 15.306(a)(1). "If award will be made without conducting discussions, offerors may be given the opportunity to ... resolve minor or clerical errors." FAR 15.306(a)(2).

3 While the FAR System establishes "uniform policies and procedures for acquisition by all executive agencies," FAR 1.101, the DFARS is the Department of Defense's "implementation and supplementation of the FAR," DFARS 201.301(a)(1), and "is codified under chapter 2 in title 48, Code of Federal Regulations," DFARS 201.303(a)(i).

4 Because the parties do not dispute the relevant procedural history, *see generally* Gov't's Br.; HPI's Br.; CDW's Br.; Blue Tech's Br.; Dell's Br.; Red River's Br., we cite to the Court of Federal Claims' recitation for convenience.

5 The Army voluntarily stayed the corrective action pending resolution of the litigation. J.A. 281.

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6 As to irreparable harm, the Court of Federal Claims found this factor weighed in favor of the Appellees because "[Appellees] would be forced to re[-]compete wholesale for contracts they have already won" and "discussions would also force the [Appellees] to bid against their own prices." *Dell*, 133 Fed.Cl. at 107. As to the balance of hardships, it found that this factor weighed in favor of Appellees because while "[t]he Government would suffer some hardship if it decided to engage in more limited clarification exchanges," "the [Appellees] would face an elevated risk of losing their awards if the Army were to conduct discussions." *Id.* As to the public interest, the Court of Federal Claims determined that the "public interest favors granting injunctive relief here" because "allowing an agency to respond disproportionately to minor procurement errors harms the integrity of the procurement system" and "introduces an unfair and unanticipated additional layer of competition." *Id.*

7 Appellants make substantially similar arguments on appeal. *See* Gov't's Br. 22; HPI's Br. 15; CDW's Br. 15. For ease of reference, we cite only to the Government's arguments unless otherwise noted.

8 Before discussing the merits of the appeal, we first address the threshold issue of jurisdiction. *See* *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) (recognizing that we have an independent "obligation to satisfy [ourselves] not only of [our] own jurisdiction, but also that of the lower courts"). Pursuant to the Tucker Act, the Court of Federal Claims has bid protest jurisdiction to adjudicate an action by an "interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). The Court of Federal Claims had jurisdiction because the Appellees are interested parties that have bid on the Solicitation and have alleged violations of the FAR and DFARS. *See* *id.*; *see also* *Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1381 (Fed. Cir. 2012) ("This court has made clear that bid protest jurisdiction arises when an agency decides to take corrective action even when such action is not fully implemented."). We, in turn, have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3) (2012).

9 Even the Appellees do not dispute that we ultimately determine whether an agency's corrective action lacked a "rational basis" by assessing the reasonableness of the corrective action. *See, e.g.*, Dell's Br. 14 ("To be found reasonable, an agency's corrective action must be rationally related to the defect to be corrected ...."); Blue Tech's Br. 21 (similar); Red River's Br. 5 (similar). However, as addressed herein, Appellees dispute the latitude afforded the lower court to apply and narrow the reasonableness analysis. *See, e.g.*, Dell's Br. 18 (disagreeing with the Government's "conten[tion] that [use of] th[e] 'more narrowly targeted' test unduly constrains the Army's discretion" under a court's reasonableness review).

10 The parties do not dispute the Court of Federal Claims' finding that procurement defects existed, namely the separate, identified defects of spreadsheet ambiguities and the failure to conduct discussions. *Dell*, 133 Fed.Cl. at 103 ("[I]t was rational for the Army to find defects in the ambiguous spreadsheets ... [because it] confused offerors and led many of them to input their line item responses incorrectly[,] ... result[ing in] ... many offerors [being deemed] technically unacceptable."); *id.* at 104 (stating "it was rational for the Army to find that it may have failed the reasonableness test [previously] articulated [by GAO] when it decided to forgo discussions" in a $5 billion procurement contract in likely violation of DFARS 215.306(c)(1)); *see, e.g.*, Gov't's Br. 18 ("The trial court correctly concluded that the Army reasonably determined that the solicitation was defective ...."); Blue Tech's Br. 2 (arguing only that the proposed corrective action is not a "logical correction" to the "defective solicitation").

11 Indeed, the Court of Federal Claims acknowledged that, while "many of the losing offerors in this procurement made minor or clerical errors" allegedly capable of correction through clarifications, *Dell*, 133 Fed.Cl. at 105, there were offerors that made "more wide-reaching errors" that were not capable of correction via clarification, *id.* at 106.

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12 The Appellees also contend that our precedent in *Systems Application* counsels against reinstating the Army's selected corrective action because "post-award corrective action that allows previously unsuccessful offerors to revise their proposals after the awardee's price has been disclosed causes harm to the original awardees." Red River's Br. 4–5 (citing *Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374 (Fed. Cir. 2012)). Reliance on *Systems Application* is improper here because that case analyzed whether a protestor suffered an injury-in-fact to have standing, *see* 691 F.3d at 1382–83, which is not at issue here. And unlike in *Systems Application*, the Court of Federal Claims here found the Army's decision to take corrective action (despite disagreeing with the proposed corrective action) was justified due to likely violating a regulation. *Dell*, 133 Fed.Cl. at 103–04; *see id.* at 104 ("Therefore, it was rational for the MFR to find that the Army's failure to conduct discussions constituted a procurement defect.").

13 We may balance the remaining three *Centech* permanent injunction factors—irreparable harm, balance of hardships, and public interest—when deciding whether to grant or deny injunctive relief; however, because we find the Court of Federal Claims erred in finding that the Appellees had "succeeded on the merits," the great weight we accord this factor as compared to the other three precludes the possibility of an injunction. *See Centech Grp.*, 554 F.3d at 1037; *see also Hallmark-Phoenix 3, LLC v. United States*, 429 F. App'x 983, 984 (Fed. Cir. 2011); *Chrysler Motors Corp. v. Auto Body Panels of Ohio, Inc.*, 908 F.2d 951, 953 (Fed. Cir. 1990) ("If the injunction is denied, the absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned the other factors, to justify the denial."). Moreover, we find that Appellees cannot meet their burden to justify a permanent injunction even if the three remaining permanent injunction factors balanced together in equilibrium, and therefore reversal is appropriate here because any alternative result on remand necessarily would have been an abuse of discretion. *Cf. Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142 (Fed. Cir. 2011) (weighing permanent injunction factors and reversing instead of remanding a lower court's decision to deny a permanent injunction).

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Matter of: Veterans Medical Supply, Inc., Comp.Gen., January 29, 2021

B- 416916.8 (Comp.Gen.), B- 416916.9, B- 416916.10, 2020 CPD P 248, 2020 WL 4697987

COMPTROLLER GENERAL

Matter of: Peraton Inc.

DOCUMENT FOR PUBLIC RELEASE The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

August 3, 2020

***1** J. Scott Hommer III, Esq., Rebecca E. Pearson, Esq., Emily A. Unnasch, Esq., Christopher G. Griesedieck, Esq., and Taylor A. Hillman, Esq., Venable LLP, for the protester.
Paul F. Khoury, Esq., Brian G. Walsh, Esq., Cara L. Lasley, Esq., Lindy C. Bathurst, Esq., and Nicholas L. Perry, Esq., Wiley Rein LLP, for ManTech Advanced Systems International, Inc., the intervenor.
Tudo N. Pham, Esq., Department of State, for the agency.

Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency corrective action is sustained where agency decided to reopen discussions to allow offerors to revise their proposals to substitute key personnel, but limited proposal revisions only to key personnel resumes, letters of commitment, and a portion of a single staffing plan template. The agency's corrective action is unreasonably limited in its scope because the solicitation required proposal sections to align and the record demonstrates that the substitution of key personnel would materially impact other aspects of the protester's proposal that it is not permitted to change and would effectively require the protester to submit a materially inconsistent proposal.

DECISION

Peraton, Inc., of Herndon, Virginia, protests the scope of the agency's corrective action following its prior protest of the issuance of a task order to ManTech Advanced Systems International, Inc., of Herndon, Virginia, under solicitation No. 19AQMM18R0065. The task order was issued through the National Institutes of Health CIO–SP3 governmentwide acquisition contract, for server and software deployment services for the Department of State's (DOS) Office of Consular Systems and Technology. Peraton argues that agency's corrective action is unreasonably restrictive.

We sustain the protest.

BACKGROUND

The agency issued the request for proposals (RFP) on January 24, 2018. B–416916.3, Agency Report (AR), COS at 2. The RFP contemplated the issuance of a task order with both fixed-price and time-and-materials contract line items. B–416916.3 AR, Tab 20, RFP at 4, 44. Additionally, the RFP provided that award would be made on the basis of a best-value tradeoff between three evaluation factors: (1) technical; (2) past performance; and (3) price. *Id.* at 44–45. The technical factor was divided into four subfactors: (1) technical approach; (2) management approach; (3) staffing plan and key personnel; and (4) corporate experience. *Id.* Relevant to this protest, the RFP required offerors to address the staffing plan and key personnel subfactor by proposing a

staffing plan that describes how they will satisfy the contract requirements. *Id.* at 40. Additionally, the RFP directed offerors to submit a staffing matrix (using a provided template), key personnel resumes, and commitment letters. *Id.* The RFP further provided that the staffing plan and key personnel subfactor would be evaluated for, among other things, "[t]he extent to which the Offeror's proposed staffing plan, to include Key Personnel and alignment of hours per labor category reflects an understanding of the Government's requirement and aligns with the Offeror's technical approach." *Id.* at 46.

***2** On September 25, 2018, the agency first issued a task order under this solicitation to Vistronix, LLC. Protest at 12–13. Peraton filed a protest of that award with our Office, alleging, among other things, that Vistronix had unmitigated organizational conflicts of interest (OCIs). *Id.* The agency took corrective action in response to that protest, and, following an investigation, concluded that Vistronix had an unmitigatable OCI. *Id.* Vistronix filed a protest of that determination with our Office, which we ultimately dismissed as untimely. *Vistronix, LLC,* B–416916.2, July 29, 2019, 2019 CPD ¶268.

The agency subsequently issued a task order to ManTech on September 27, 2019. B–416916.3 Memorandum of Law (MOL) at 3. Peraton filed a protest of the new award alleging, among other things, numerous evaluation errors and disparate treatment. Protest at 13. Prior to the agency report, the protester also filed a supplemental protest alleging additional instances of disparate evaluation. *See* B–416916.3 First Supp. Protest *generally.* The agency filed its report responding to the protest allegations on November 8. *See* B–416916.3 MOL.

On November 18, the protester filed a second supplemental protest alleging, among other things, that ManTech's letters of commitment for key personnel did not meet the solicitation's clearly stated requirements for such letters. *See* B–416916.3 Second Supp. Protest at 14–16. Following additional briefing by the parties, the GAO attorney assigned to the protest conducted an outcome prediction alternative dispute resolution (ADR) teleconference on December 20. During the teleconference, the GAO attorney informed the parties that the only protest argument that appeared meritorious concerned ManTech's key personnel letters of commitment, which did not appear to meet the solicitation's clearly stated requirements. Specifically, the solicitation required that commitment letters include the signature of key personnel confirming their intention to serve in a stated position at contract award. RFP at 40. The awardee's letters of commitment, however, did not state or reference any positions, and, in some cases, it was unclear from the letters whether the signing individual knew the position for which they were being proposed. *See* B–416916.3, Tab 33, ManTech's Proposal with Tracked Changes, at 151–158.

Later, on December 30, the agency filed a notice of its intent to take corrective action in response to Peraton's protest by reopening discussions to confirm the availability of proposed key personnel, update letters of commitment, and validate proposals. B–416916.3 Corrective Action Memorandum. On January 8, 2020, we dismissed Peraton's protest as academic due to the agency's proposed corrective action. *Peraton, Inc.,* B–416916.3, B–416916.4, Jan. 8, 2020 (unpublished decision).

***3** On January 9, 2020, Peraton filed a protest of the agency's corrective action with our Office, alleging that the agency's corrective action was both unreasonably narrow and reflected an unfair agency bias in favor of ManTech. B–416916.5 Protest at 12–27. We denied that protest on the basis that the agency's corrective action was narrowly focused on the only procurement fault identified in the outcome prediction ADR, and no other portions of an offeror's proposal would reasonably be affected by the proposed discussions, because the agency only sought confirmation of the availability of previously proposed key personnel. *Peraton Inc.,* B–416916.5, B–416916.7, April 13, 2020, 2020 CPD ¶144.

Following our denial of Peraton's corrective action protest, the agency issued a discussion letter seeking confirmation that each offeror's key personnel were available, and requesting updated commitment letters. Agency Report (AR), Tab 52, Discussion Letter, Apr. 14, 2020, at 1. On April 17, Peraton responded that it had replaced several of its key personnel and asked that offerors be allowed to substitute key personnel and submit new commitment letters and resumes without rejecting the proposal as technically unacceptable. AR, Tab 53, Letter from Peraton to Contracting Officer, Apr. 17, 2020, at 1. Of note, Peraton did not at that time request an opportunity to make any other proposal revisions. *Id.* On April 23, the agency acceded to Peraton's request and indicated that offerors would be permitted to substitute key personnel, but were not required to do so. AR, Tab 54, Discussion Letter, Apr. 23, 2020, at 1.

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Later that day, Peraton responded that it believed that substitutions of key personnel would materially affect its technical and price proposals and requested that the agency also permit offerors to revise all aspects of their technical and price proposals. AR, Tab 55, Letter from Peraton to Contracting Officer, Apr. 23, 2020, at 1. On April 24, the agency responded that offerors who proposed key personnel changes were permitted to make changes only to their key personnel resumes, letters of commitment, and to the column on the staffing plan template labelled "Relevant Years of Experience and Certifications." *See* AR, Tab 56, Discussion Letter, Apr. 24, 2020, at 1. This protest followed. [1]

DISCUSSION

The protester argues that the agency's decision to limit proposal revisions to key personnel resumes, letters of commitment, and one staffing plan column is unreasonably narrow. *See* Protest at 24–33. First, the protester notes that the solicitation, among other things, requires the agency to evaluate ""[t]he extent to which the Offeror's proposed staffing plan, to include Key Personnel and alignment of hours per labor category reflects an understanding of the Government's requirement and aligns with the Offeror's technical approach." *Id.* at 9 (*citing* RFP at 46). In this regard, the protester notes that its technical proposal discusses its previously proposed key personnel at length, either by name or by discussing their specific qualifications or credentials, and the agency's proposed corrective action would preclude Peraton from making changes to these aspects of its proposal. *Id.* at 25–26, 30–31.

***4** Further, the protester notes that its staffing plan submission included narratives discussing its key personnel, which the current corrective action would also prevent it from revising. Protester's Comments and Second Supp. Protest at 12–14. Finally, the protester argues that its new staff may have different levels of experience than its originally proposed staff, and, accordingly, would have different labor rates which would affect its pricing. *Id.* at 28–29.

The protester contends that, by refusing to permit it to amend those aspects of its proposal, the agency is forcing the protester to submit a proposal that is both inconsistent on its face and would not comply with the solicitation's requirement that key personnel and staffing be aligned with an offeror's technical approach. *Id.* at 25–26. In this connection, the protester relies on our decision in *Deloitte Consulting, LLP,* B–412125.6, Nov. 28, 2016, 2016 CPD ¶355, in which we concluded that a similar corrective action was unreasonably restrictive. Protest at 27–28.

In response, the agency contends that changes to offerors' technical approaches are unnecessary because the agency did not evaluate specific key personnel as part of its evaluation of any other technical subfactor. MOL at 8–9. Rather the agency argues that it evaluated alignment between the staffing plan and technical approach only by considering whether the level of effort proposed was adequate to perform the technical approach. *Id.* at 11–12, 17–18. This analysis would not be impacted by changes in the identity of key personnel. *Id.* The agency contends that key personnel were only individually assessed as part of the evaluation of the key personnel evaluation factor, and that personnel resumes contain all information necessary to perform that evaluation. *Id.* at 18–20. Accordingly, the agency concludes that it can reevaluate proposals consistent with the solicitation's requirements without permitting broader revisions to proposals. *Id.*

Separate from the agency's substantive arguments, however, the agency also raises an argument concerning the unique procedural posture of this case. *See* MOL at 3–6, 33. As discussed above, following our decision denying Peraton's prior protest of the agency's corrective action, the agency sought confirmation from Peraton and ManTech concerning the continued availability of their key personnel. *Id.* ManTech's key personnel remained available, while several of Peraton's key personnel did not, and Peraton requested an opportunity to substitute key personnel. *Id.* In the interest of fairness and fostering competition, the agency agreed to permit key personnel substitutions, but limited the scope of those revisions. *Id.*

***5** The agency contends that it is unfair for Peraton to now protest a change in the scope of the agency's corrective action that the agency undertook solely at Peraton's request. [2] *Id.* The agency contends that to sustain this protest would, in effect, penalize the agency for attempting to foster competition, noting that "no good deed goes unpunished." *Id.* at 33.

An agency's discretion when taking corrective action extends to the scope of proposal revisions. *See, e.g., Computer Assocs. Int'l., Inc.,* B–292077.2, Sept. 4, 2003, 2003 CPD ¶157 at 5; *Rel–Tek Sys. & Design, Inc.-Modification of Remedy,* B–280463.7, July 1, 1999, 99–2 CPD ¶1 at 3. As a general matter, offerors in response to discussions may revise any aspect of their proposals as they see fit, including portions of their proposals which were not subject to discussions; an agency, in conducting discussions to implement corrective action, may, however, reasonably limit the scope of revisions. *System Planning Corp.,* B–244697.4, June 15, 1992, 92–1 CPD ¶516 at 3.

Where an agency's proposed corrective action does not also include amending the solicitation, we will not question an agency's decision to restrict proposal revisions when taking corrective action so long as it is reasonable in nature and remedies the established or suspected procurement impropriety. *See Consolidated Eng'g Servs., Inc.,* B–293864.2, Oct. 25, 2004, 2004 CPD ¶214 at 3–4; *Computer Assocs. Int'l, supra.* In reviewing the reasonableness of an agency's restrictions on the extent of discussions to implement corrective action, we will consider whether the discussions, and permitted revisions in response to discussions, are expected to have a Alaska, Inc., B–409327.3, Apr. 14, 2014, 2014 CPD ¶128 at 8; *Honeywell Technology Solutions, Inc.,* B–400771.6, Nov. 23, 2009, 2009 CPD ¶240 at 4; *see also Rel–TekSys. & Design, Inc.-Modification of Remedy, supra; ST Aerospace Engines Pte. Ltd.,* B–275725.3 Oct. 17, 1997, 97–2 CPD ¶106 at 4.

In our prior decision concerning the agency's corrective action in this procurement, we did not object to the agency's decision to limit proposal revisions to areas in which our Office identified improprieties in the prior award decision. *See Peraton Inc., supra.* However, even when an agency is justified in restricting discussions responses in corrective action, the agency may not prohibit offerors from revising related areas of their proposals which are materially impacted. In this case, the proposed corrective action would prevent the protester from conforming many specific references to key personnel, which would effectively require the protester to submit a materially inconsistent proposal.

***6** While the agency argues that it was only required to evaluate alignment between the staffing plan and technical approach by considering whether the level of effort proposed was adequate to perform the technical approach, it is not clear that such an evaluation approach is consistent with the solicitation or the record. The solicitation required that the agency evaluate "[t]he extent to which the Offeror's proposed staffing plan, to include Key Personnel *and* alignment of hours per labor category reflects an understanding of the Government's requirement *and* aligns with the Offeror's technical approach." RFP at 46 (emphasis added). This requirement appears to contemplate that the agency would assess both the key personnel identified in the staffing plan and the hours per labor category to determine whether they align with the offeror's technical approach. *Id.* It is not clear that the agency's position is consistent with the plain language of the solicitation. Put another way, if an offeror's technical approach narratives had, in the first instance, included references to entirely different key personnel than were described in that offeror's staffing plan, it would have been clearly unreasonable and contrary to the solicitation for the agency to ignore that inconsistency. However, that is essentially what the agency proposes to do now.

Furthermore, the evaluation record does not support the agency's argument that it has permitted offerors to amend all aspects of their proposals where the agency actually evaluated key personnel as individuals. Specifically, the agency's proposed corrective action would permit revisions only to one column in the staffing plan matrix, but not to the accompanying staffing plan narratives that the offerors included in their proposals. However, as the protester notes, information in those narratives was referenced in the agency's evaluation as part of the basis of a strength assigned to the protester's proposal. Protester's Comments and Second Supp. Protest at 12–14 (*citing* AR, Tab 37, Technical Evaluation Panel Report, at 10).

While we are sympathetic to the agency's fairness concerns, once the agency made an election to allow proposal revisions, the agency was required to seek these revisions in a reasonable manner. The limited scope of proposal revisions allowed by the agency, however, is unreasonable in this case. That is to say, the agency could have, consistent with our prior decision, declined to permit Peraton to substitute key personnel. *See Peraton Inc., supra.* However, because the agency has chosen to permit substitutions of key personnel, the agency must permit offerors to conform the portions of their proposals that refer to key personnel whom they are no longer proposing, whether that reference is by name or to unique qualifications of those individuals

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that are not shared by the newly proposed personnel. To conclude otherwise would, in effect, force offerors to submit facially inconsistent proposals and force the agency to ignore the solicitation's requirement that it evaluate how proposed key personnel align with an offeror's technical approach.

***7** Further, this is precisely the kind of limitation on proposal revisions that we concluded was unreasonably restrictive in our decision in *Deloitte Consulting, LLP, supra.* Specifically, in that case, the agency originally proposed corrective action in response to an earlier protest that would have permitted offerors to substitute key personnel and to make proposal revisions only to the key personnel and past performance subfactor of their proposals. *Deloitte Consulting, LLP, supra* at 4. However, the protester in that case, as with Peraton in this case, had made specific reference to its key personnel throughout its technical proposal and challenged the agency's decision to prevent it from conforming those references. *Id.* Our Office conducted an ADR in which we questioned the propriety of the agency's limitations to the scope of proposal revisions because they would prevent the protester from conforming material inconsistencies in its proposal. *Id.* at 4–5.

Following the ADR, the agency again took corrective action, and proposed to permit offerors to amend their technical proposals only by altering any references to specific key personnel or their qualifications, which Deloitte also protested. *Id.* at 5. We concluded that this expanded approach to proposal revisions remained unreasonably restrictive because the protester showed that changes in its key personnel would have material effects on its substantive technical approach. *Deloitte Consulting, LLP, supra* at 8–10. In short, our prior decision, on very similar facts, rejected precisely the same kind of limitation on proposal revisions advanced by the agency in this case, and, indeed, even rejected a less restrictive limitation.

In response, the agency relies on our decision in *ActioNet, Inc.,*B–416557.4, Feb. 27, 2019, 2019 CPD ¶97, but that reliance is misplaced. MOL at 6–8. In that decision we found no basis to object to an agency's decision to limit proposal revisions to substitutions of key personnel, but specifically distinguished *Deloitte Consulting, LLP, supra,* on the basis that the protester in *ActioNet* conceded that other portions of its proposal would be unaffected by changes to key personnel. *ActioNet, Inc., supra* at 7 n.10. Here, by contrast, the protester makes no such concession.

Further, the protester demonstrates how its proposed technical approach is meaningfully reliant on the qualifications or credentials of its key personnel. *See* Protester's Comments and Second Supp. Protest at 22–31. For example, the protester notes that its original approach to reducing transition risk was predicated, in part, on the fact that the personnel it proposed were incumbent personnel with many years of experience, who possessed security clearances, and who were trained on DOS-specific applications and systems. Protester's Comments and Second Supp. Protest at 28–30. The protester credibly contends that this and other aspects of its technical proposal would require revision to reflect the differing skills and qualifications of its newly proposed personnel. Because the protester's substitute key personnel have different qualifications and experience, and the protester's technical approach meaningfully relied on the qualifications and experience of its originally proposed personnel, we agree that the permitted revisions should extend to revising references to substituted key personnel in Peraton's technical proposal as necessary to reflect the skills of its new personnel, or to otherwise address the proposal content impacted by the removal of the prior key personnel.

***8** Finally, the protester contends that the agency's refusal to permit revisions with respect to price proposals is also unreasonable. Protest at 28–29; Protester's Comments and Second Supp. Protest at 19–20. However, the protester has not clarified in what way its pricing would be materially affected by the substitution of personnel, other than to argue that key personnel with differing levels of experience may have different labor rates, and that prevailing labor rates in general have changed since proposals were originally submitted due to inflation. *Id.* In the context of this task order, the protester proposed pricing for labor categories not for named individuals. *See* AR, Tab 32, Peraton's Pricing Table; *see also* Intervenor's Comments at 7 (arguing that the underlying contract constrains pricing for labor categories). The protester has not contended that its new personnel would be mapped to different labor categories, or, indeed, offered any specific explanation concerning how its rates would change beyond offering a hypothetical.[3] Accordingly, it is unclear to what extent the protester would or could meaningfully change its prices in this context.

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Further, in this case, the awardee's price has been publicly disclosed following award. Permitting price revisions when the awardee's price has been disclosed has implications for procurement integrity, and we have previously concluded that permitting price revisions is not required in similar circumstances. *See Consolidated Eng'r Services, supra* at 1, 4–5 (rejecting argument that agency must permit price revisions when permitting key personnel revisions where awardee's price has been disclosed and the number and nature of key personnel positions had not changed). We see no basis to conclude that the agency's limitation of revisions to price proposals is unreasonable on these facts.

RECOMMENDATION

We find that the agency's limitations on the scope of revisions in response to corrective action are unreasonably restrictive, where the limitations prohibit the protester from revising aspects of its technical proposal that are materially impacted by the corrective action. If the agency intends to permit key personnel substitutions, we recommend that DOS amend its proposal revision instructions to permit offerors to revise aspects of their technical proposals to the extent that the revisions relate to the permitted substitutions of key personnel, and thereafter reevaluate the offerors' revised technical proposals. We also recommend that Peraton be reimbursed the costs of filing and pursuing its protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly with the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

***9** The protest is sustained.

Thomas H. Armstrong
General Counsel

Footnotes

1 The awarded value of this task order is $129,995,272. B–416916.3 COS at 6. Because the awarded value of the task order exceeds $10 million, this protest is within our jurisdiction to consider protests of task orders placed under civilian agency indefinite-delivery, indefinite-quantity multiple award contracts. *See* 41 U.S.C. § 4106(f)(1)(B).

2 Peraton, collaterally, challenges the agency's decision to permit substitution of key personnel because the basis of the agency's decision was inadequately documented. *See* First Supp. Protest at 7–10. We do not reach the issue as we are sustaining the protest of the scope of corrective action on other grounds.

3 We also note that the record does not reflect whether the protester is suggesting that its revisions would result in higher or lower pricing, which is particularly anomalous given that the protester has already identified its four substitute key personnel. *Compare* Protest at 2 (changes "may reduce price difference") with 28 (noting that labor rates have "increased across the industry").

B- 416916.8 (Comp.Gen.), B- 416916.9, B- 416916.10, 2020 CPD P 248, 2020 WL 4697987

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B- 419271.4 (Comp.Gen.), B- 419271.7, 2021 CPD P 169, 2021 WL 1750373

COMPTROLLER GENERAL
DOCUMENT FOR PUBLIC RELEASE The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

Matter of: Qwest Government Services, Inc. d/b/a CenturyLink QGS

April 14, 2021

***1** Shelly L. Ewald, Esq., Zahra S. Abrams, Esq., Robert Shaia, Esq., and Emily C. Brown, Esq., Watt Tieder Hoffar & Fitzgerald, LLP, for the protester.
Jonathan M. Baker, Esq., Christian N. Curran, Esq., Alexandra L. Barbee-Garrett, Esq., and Rina M. Gashaw, Esq., Crowell & Moring LLP, for AT&T Corp., an intervenor.
Peter G. Hartman, Esq., and Brian C. Habib, Esq., Department of Homeland Security, for the agency.

Louis A. Chiarella, Esq., Emily R. O'Hara, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's evaluation of the protester's technical proposal is denied where the agency's evaluation was reasonable and consistent with the stated evaluation criteria, and without prejudice to the protester.

2. Protest alleging the agency failed to engage in proper discussions with the protester is denied where the protester fails to demonstrate that it was prejudiced as a result thereof.

3. Protest alleging that the agency's corrective action subsequent to the initial award decision was unfair and unequal is denied where the corrective action did not treat offerors unequally and did not permit any offeror to revise its proposal.

DECISION

Qwest Government Services, Inc. d/b/a CenturyLink QGS (CenturyLink), of Monroe, Louisiana, protests the issuance of task orders to AT&T Corp., of Oakton, Virginia, under fair opportunity request for proposals (RFP) No. 70RTAC20R00000026, issued by the Department of Homeland Security (DHS) for DHS headquarters core data (HQCD) requirements. The protesters contend that the agency's evaluation of offerors' task order proposals and resulting award decision were improper.

We deny the protest.

BACKGROUND

The DHS is in the process of modernizing its information technology services and capabilities, with the goal of "improve[ing] network and telecommunications service delivery across the Department. . . ." Agency Report (AR), Tab 7d, Statement of Work (SOW) at 13; *see* Contracting Officer's Statement (COS) at 2. To support its network transition, transformation, and modernization efforts, DHS developed the HQCD requirements SOW here. Specifically, "DHS seeks to acquire, or have the option to acquire in the future," the following: virtual private network service; ethernet transport service; optical wavelength service; private line service; internet protocol service; internet protocol voice service; managed network service; managed trusted internet protocol service; access arrangements; cable and wiring service; dark fiber service; modernize to a software-

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defined wide area network (SD-WAN); trusted internet connection and policy enforcement point; web conferencing service; and circuit switch voice service. SOW at 13.

***2** The RFP was issued on June 24, 2020, to holders of General Services Administration (GSA) Enterprise Infrastructure Solutions (EIS) governmentwide acquisition contracts, pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 16.5. [1] AR, Tab 7, RFP at 4. [2] The solicitation contemplated the issuance of four task orders, on a fixed-price with economic price adjustment, and a time-and-materials with economic price adjustment bases, for a base year with eleven 1-year options. [3] RFP at 9, 63. The RFP also established that task order award would be made on a best-value tradeoff basis, based on three evaluation factors in descending order of importance: (1) performance management approach; (2) transition and modernization approach; and (3) price. *Id.* at 76-77. The non-price factors, when combined, were significantly more important than price. *Id.* at 77.

AT&T and CenturyLink were among the offerors that submitted task order proposals by the July 27 closing date. An agency technical evaluation team (TET) evaluated non-price proposals using the following adjectival rating scheme to assess the level of confidence of successful performance: high confidence, some confidence, or low confidence. A separate price evaluation team (PET) evaluated price proposals, in accordance with the solicitation, for accuracy, completeness, and reasonableness. *See* RFP at 78. On September 28, after completing its evaluation, the agency selected AT&T for four task order awards. COS at 3.

On October 6, CenturyLink filed a protest with our Office challenging the evaluation and awards to AT&T. The agency thereafter informed our Office that it planned to take corrective action by terminating the task orders issued to AT&T, reevaluating proposals, and making a new award decision; DHS also reserved the right to conduct discussions with offerors as part of its corrective action. AR, Tab 27, DHS Notice of Corrective Action, B-419271, Nov. 9, 2020, at 1. We thereafter dismissed the earlier CenturyLink protest as academic. *Qwest Gov't Servs., Inc. d/b/a CenturyLink QGS*, B-419271, Nov. 10, 2020 (unpublished decision).

On December 29, the agency completed its reevaluation, with the final evaluation ratings and prices of the AT&T and CenturyLink proposals as follows:

	AT&T	**CenturyLink**
Performance Management Approach	High Confidence	Some Confidence
Transition and Modernization Approach	High Confidence	Some Confidence
Price	$306,183,079	$279,932,592

***3** AR, Tab 15, Source Selection Decision Document (SSDD) at 3.

The agency evaluators also made narrative findings--identified as elements that increased the confidence of success, or elements that decreased the confidence of success--in support of the assigned ratings. For example, with regard to the performance management approach factor (the most important of the solicitation's evaluation criterion), the TET identified three elements that increased confidence in AT&T's proposal, while finding three elements that decreased confidence in CenturyLink's proposal. AR, Tab 12, TET Report at 6-7.

On December 29, the agency's source selection authority (SSA) received and reviewed the evaluation ratings and findings. AR, Tab 15, SSDD at 1-9. The SSA determined that AT&T's technical advantages, as compared to CenturyLink's proposal, outweighed CenturyLink's price advantage, and thereby made AT&T the overall best value to the government. *Id.* at 10-11.

On January 5, 2021, the agency issued the four task orders to AT&T. COS at 4. After requesting and receiving a debriefing, CenturyLink filed this protest with our Office on January 11. [4] *Id.*

DISCUSSION

CenturyLink raises a multitude of issues regarding the agency's evaluation and resulting award decision. First, CenturyLink contends that DHS's evaluation of the offeror's technical proposal was unreasonable and inconsistent with the stated evaluation criteria. CenturyLink also alleges the agency failed to hold meaningful, adequate, and equal discussions with it. Lastly, the protester claims that the entirety of DHS's corrective action was unequal and unfair, and engaged in only for the benefit of AT&T. Had the agency performed a reasonable evaluation of CenturyLink's proposal, or if proper discussions had occurred, CenturyLink argues, its proposal would have been represented the overall best solution to the government. Protest at 14-29; Comments & Supp. Protest at 19-46. Although we do not address all of the issues and arguments raised by CenturyLink, we have considered them all and find no basis on which to sustain the protest.

Technical Evaluation of CenturyLink

CenturyLink protests the agency's technical evaluation. Specifically, CenturyLink challenges the four instances where DHS found elements that decreased confidence in the offeror's proposal under the two non-price factors; CenturyLink does not dispute any other aspect of its technical evaluation, nor the technical evaluation of AT&T. Protest at 15-25; Comments & Supp. Protest at 20-37.

As stated above, the task order competition here was conducted pursuant to FAR subpart 16.5. The evaluation of proposals in a task order competition is primarily a matter within the contracting agency's discretion, because the agency is responsible for defining its needs and the best method of accommodating them. *NCI Info. Sys., Inc.*, B-418977, Nov. 4, 2020, 2020 CPD ¶ 362 at 5; *Engility Corp.*, B-413120.3 *et al.*, Feb. 14, 2017, 2017 CPD ¶ 70 at 15. In reviewing protests of an award in a task order competition, we do not reevaluate proposals, but examine the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. *DynCorp Int'l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 7. A protester's disagreement with the agency's judgment regarding the evaluation of proposals or quotations, without more, is not sufficient to establish that an agency acted unreasonably. *Engility Corp.*, *supra* at 16; *Imagine One Tech. & Mgmt., Ltd.*, B-412860.4, B-412860.5, Dec. 9, 2016, 2016 CPD ¶ 360 at 4-5. Our review indicates that the agency's technical evaluation of CenturyLink was both reasonable and without prejudice to the protester.

***4** For example, CenturyLink challenges the "decrease confidence" element assessed against its proposal under the transition and modernization approach factor. Here, the RFP established the agency would evaluate the extent to which proposals: (1) presented a clear understanding of the solicitation's transition and modernization requirements; (2) provided a clear explanation of the offeror's transition management approach; and (3) presented a modernization management approach "which represent[ed] short term modernization and beyond, inclusive of the ability to design, test and implement emerging technologies, . . . key resources and organization structure." RFP at 72.

CenturyLink's transition and modernization approach proposal included tables indicating a notional, 9-month transition schedule (October 1, 2020, to June 30, 2021), and a notional, 18-month modernization schedule (October 1, 2020, to March 31, 2022). AR, Tab 8, CenturyLink Proposal, Vol. I, Technical Proposal, at 82-83, 116. Additionally, relevant to the protest here, CenturyLink's transition proposal stated:

> The objective of this [transition] plan is to address the transition of like-for-like services on the current network services provisioned through expiring contracts to the EIS contract with a targeted completion

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> in approximately nine months contingent upon DHS approval. As this plan evolves, CenturyLink and DHS can begin to refine the Modernization Strategy as discussed in Section 2.4 below.

Id. at 81.

The TET found this aspect of CenturyLink's proposal to be an element that decreased performance confidence. [5] *Id.* Specifically, the evaluators stated:

> CenturyLink proposes a 9[-]month like-for-like transition in its initial phase and does not attempt to undertake any modernization efforts during this window, aside from completing some preparatory site work for future upgrades. This decreases DHS'[s] confidence in CenturyLink's approach because a like-for-like transition without modernization can be completed more quickly [,] but the modernization is delayed until [a] later phase and this does not increase the Government's confidence.

Id.

CenturyLink argues the agency misconstrued its proposal and failed to consider the substantial modernization efforts which CenturyLink had proposed during its 9-month transition period. Comments & Supp. Protest at 27-32. The protester also argues that "CenturyLink proposed some of the same modernization efforts . . . within the same timeframe as proposed by AT&T," whose proposal was assessed favorably with regard to modernization. [6] *Id.* at 32. The agency maintains that the evaluation here was reasonable in light CenturyLink's statement to provide the agency "with the same services it has today" (*i.e.*, ""like-for-like") during the 9-month transition period. COS at 12. DHS also argues that it did not engage in disparate treatment, as offerors' modernization plans were different. Supp. Memorandum of Law (MOL) at 16-19.

***5** We find the agency's evaluation here to be reasonable and consistent with the stated evaluation criterion. As set forth above, CenturyLink stated that the goal of its transition plan was "to address the transition of like-for-like services on the current network services provisioned through expiring contracts to the EIS contract with a targeted completion in approximately nine months contingent upon DHS approval." AR, Tab 8, CenturyLink Proposal, Vol., I, Technical Proposal, at 81. Based on this language, the agency evaluators reasonably concluded that CenturyLink intended to provide the same telecommunication services currently in place, and not undertake modernization efforts, during the 9-month transition period. AR, Tab 12, TET Report at 8. The TET also reasonably found that CenturyLink's delayed modernization effort decreased confidence in successful performance. *Id.*

Although CenturyLink contends that other parts of its proposal indicated the offeror would undertake modernization activities concurrent with transition, the protester does not dispute that the aforementioned language in its submission expressed only like-for-like efforts during the transition period. As we have consistently stated, it is an offeror's responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. *Adams Commc'n & Eng'g Tech., Inc.*, B-419052 *et al.*, Dec. 3, 2020, 2021 CPD ¶ 95 at 18; *Engility Corp.*, *supra*. Where a proposal is unclear or internally inconsistent, the offeror risks having such an inadequately written proposal evaluated unfavorably. *Aerostar Perma-Fix TRU Servs., LLC*, B-411733, B-411733.4, Oct. 8, 2015, 2015 CPD ¶ 338 at 8; *STG, Inc.*, B-411415, B-411415.2, July 22, 2015, 2015 CPD ¶ 240 at 5-6. At best, even assuming as the protester argues, that CenturyLink's proposal contained differing statements in different places regarding its modernization schedule, the agency's evaluation of the offeror's contradictory and inconsistent proposal language was a reasonable one. *Davis Def. Grp., Inc.*, B-417470, July 11, 2019, 2019 CPD ¶ 275 at 8.

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We also find no merit to CenturyLink's assertion that DHS's evaluation of modernization plans was unequal. It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors or vendors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. *CSRA LLC*, B-417635 *et al.*, Sept. 11, 2019, 2019 CPD ¶ 341 at 9; *22nd Century Techs., Inc.*, B-417336, B-417336.2, May 24, 2019, 2019 CPD ¶ 198 at 6. Where a protester alleges unequal treatment in a technical evaluation, it must show that the differences in ratings did not stem from differences between the offerors' proposals. *Camber Corp.*, B-413505, Nov. 10, 2016, 2016 CPD ¶ 350 at 8. In our view, CenturyLink's disparate treatment argument is premised on an incorrect "apples and oranges" comparison of offerors' task order proposals and not unequal treatment. *CSRA LLC*, *supra*; *see AMTIS-Advantage, LLC*, B-411623, B-411623.2, Sept. 16, 2015, 2015 CPD ¶ 360 at 6.

***6** CenturyLink claims that it proposed "substantial" modernization activities within the first nine months (270 days) after task order award; the protester also essentially "cherry-picks" instances where the two offerors had modernization efforts in common. Comments & Supp. Protest at 29. The TET, however, found that AT&T had proposed completing most areas of modernization within the first six months (180 days) of task order award. AR, Tab 12, TET Report at 5-6. As AT&T's modernization activities were reasonably found to be both more extensive and over a shorter time period than CenturyLink's, there is no evidence of unequal treatment. In sum, the record does not indicate that CenturyLink and AT&T proposed the same modernization plans and were given different ratings. Rather, our review indicates that the offerors proposed different features and reasonably received different evaluation ratings from the agency. *Tatitlek Techs., Inc.*, B-416711 *et al.*, Nov. 28, 2018, 2018 CPD ¶ 410 at 13.

In any event, we find that CenturyLink has failed to establish that it was prejudiced by the technical evaluation errors it alleges. Competitive prejudice is an essential element of a viable protest, and we will sustain a protest only where the protester demonstrates that, but for the agency's improper actions, it would have had a substantial chance of receiving the award. *Information Mgmt. Res., Inc.*, B-418848, Aug. 24, 2020, 2020 CPD ¶ 279 at 7 n.4. Where the record establishes no reasonable possibility of prejudice, we will not sustain a protest irrespective of whether a defect in the procurement is found. *Procentrix, Inc.*, B-414629, B-414629.2, Aug. 4, 2017, 2017 CPD ¶ 255 at 11-12.

As set forth above, CenturyLink disputes the four elements the agency found decreased confidence in the protester's technical proposal. The record reflects, however, that it was not CenturyLink's technical shortcomings, but rather, the elements which increased confidence in AT&T's proposal on which the SSA relied when making the price/technical tradeoff decision. Specifically, the SSA compared AT&T's higher-rated, higher-priced proposal with CenturyLink's lower-rated, lower-priced proposal and identified the following AT&T technical advantages:

- AT&T was the sole offeror to [DELETED] per task order and to [DELETED], thereby ensuring service continuity at the task order level.
- AT&T was the sole offeror to propose to execute the transition, inclusive of all modernization objectives, in the initial 180 calendar day phase of its schedule.
- AT&T was the sole offeror to include a [DELETED] in the initial transition period.
- AT&T was the only offeror to correctly identify [DELETED] and include it in its proposal as a recommendation for future use by DHS.

***7** • AT&T's proposal was superior to all other offerors with regard to the number of key personnel, transition schedule, and associated level of modernization.

AR, Tab 15, SSDD at 10.

The SSA thereafter concluded that DHS was "willing to pay the increase in price by $26,250,487 higher (9%)," because the aforementioned advantages in AT&T's technically-superior proposal made it the overall best value to the government. *Id.*

Here the record demonstrates that CenturyLink's shortcomings were not relied upon nor relevant to the agency's award determination. *Dell Servs. Fed. Gov't, Inc.*, B-412340 *et al.*, Jan. 20, 2016, 2016 CPD ¶ 43 at 5 n.3. Even with the removal of the identified shortcomings to CenturyLink's proposal, the technically-superior aspects of AT&T's proposal on which the SSA

relied when making his best-value tradeoff decision remain undisturbed. *Bodell Constr. Co.*, B-419213, B-419213.2, Dec. 28, 2020, 2021 CPD ¶ 44 at 5; *Perspecta Enter. Sols., LLC*, B-418533.2, B-418533.3, June 17, 2020, 2020 CPD ¶ 213 at 19. In sum, although CenturyLink claims the agency erred in assigning the decrease confidence elements to the offeror's proposal, CenturyLink has failed to show that it was prejudiced by those aspects of the evaluation it challenges.

Adequacy of Discussions

CenturyLink also protests the adequacy of the agency's discussions. Specifically, the protester contends that DHS failed to hold meaningful and adequate discussions with it regarding the aforementioned, decrease-confidence elements found in the offeror's proposal. Protest at 25-29; Comments & Supp. Protest at 38-44. Had such discussions taken place, CenturyLink argues, it would have easily addressed the four shortcomings identified in its technical proposal. Protest at 27-29.

After receipt of offerors' proposals, the agency held several rounds of exchanges with offerors. COS at 13-17. These exchanges largely concerned clarifications to the offerors' price proposals, *e.g.*, the agency requested clarification/updates to 37 CLINs in CenturyLink's proposal for which no offered price was specified, and reminded offerors that "$0.00" should be inserted where a price was being waived. AR, Tab 13c, DHS Exchange with CenturyLink, Aug. 10, 2020, at 3-5.

CenturyLink argues that the four decrease-confidence elements assessed against its technical proposal were "tantamount to 'significant weaknesses,"DDD' which the agency was therefore required to raise in discussions. Protest at 28. The agency maintains that its exchanges with offerors were equal and did not amount to discussions. MOL at 12. Further, even should the exchanges be considered discussions, the agency posits, they were fair and meaningful, and that the four shortcomings identified in CenturyLink's technical proposal were not significant weaknesses that were required to be discussed. *Id.* at 17.

***8** The regulations concerning discussions under FAR part 15, which pertain to negotiated procurements, do not, as a general rule, govern task and delivery order competitions conducted under FAR part 16, such as the procurement for the task order here. *See NCI Info. Sys., Inc.*, B-405589, Nov. 23, 2011, 2011 CPD ¶ 269 at 9. In this regard, FAR section 16.505 does not establish specific requirements for discussions in a task order competition; nonetheless, when exchanges with the agency occur in task order competitions, they must be fair and not misleading. *Id.*; *General Dynamics Info. Tech., Inc.*, B-406059.2, Mar. 30, 2012, 2012 CPD ¶ 138 at 7 (finding that exchanges in the context of FAR section 16.505, like other aspects of such a procurement, must be fair). When holding discussions, procuring agencies are not permitted to engage in conduct that favors one offeror over another. *Deloitte Consulting, LLP*, B-412125.2, B-412125.3, Apr. 15, 2016, 2016 CPD ¶ 119 at 17. An agency is not required, however, to afford offerors all-encompassing discussions, or to discuss every aspect of a proposal that receives less than the maximum score, and is not required to advise of a weakness that is not considered significant, even where the weakness subsequently becomes a determinative factor in choosing between two closely ranked proposals. *Education Dev. Center, Inc.*, B-418217, B-418217.2, Jan. 27, 2020, 2020 CPD ¶ 61 at 5-6; *L-3 STRATIS*, B-404865, June 8, 2011, 2011 CPD ¶ 119 at 6-7.

Here, we need not decide whether the agency's exchanges constituted discussions, or whether DHS was required to discuss the four elements found to decrease confidence in the offeror's submission, because CenturyLink has again failed to demonstrate that it was prejudiced by the challenged agency conduct.

CenturyLink argues that had DHS conducted discussions with it regarding the identified technical shortcomings, CenturyLink would have addressed these issues. Protest at 27-29. The protester, however, has neither alleged nor demonstrated that it would have altered its proposal in any other regard. Protest, *passim*; Comments & Supp. Protest, *passim*. As we have found that the four technical shortcomings in CenturyLink's proposal were not prejudicial to the protester--their removal would not alter the agency's price/technical tradeoff determination--the discussions regarding same are also without prejudice to CenturyLink. Quite simply, the protester's competitive standing would not have improved even if the firm had been able to address the shortcomings identified in its technical proposal. [7] *See Picturae Inc.*, B-419233, Dec. 30, 2020, 2021 CPD ¶ 13 at 7.

Conduct of the Agency's Corrective Action

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***9** CenturyLink also challenges the conduct of the agency's corrective action subsequent to the initial award determination. The protester alleges that even if DHS opened discussions with offerors during corrective action, the agency again failed to hold equal and adequate discussions with CenturyLink regarding the shortcomings identified in its technical proposal. Protest at 26-29. CenturyLink also maintains that the agency's corrective action was generally unfair and unequal. Comments & Supp. Protest at 3. As detailed below, we find all of CenturyLink's assertions regarding the agency's corrective action to be meritless.

After the initial award to AT&T, CenturyLink filed a protest with our Office on October 6, 2020, challenging the agency's evaluation and award decision. Protest, B-419217, Oct. 6, 2020. First, CenturyLink alleged that AT&T was ineligible for task order award because AT&T did not have all required CLINs on its EIS contract as of the task order award date. [8] Protest, B-419217, Oct. 6, 2020, at 15-17. Additionally, as with its protest here, CenturyLink asserted the agency's technical evaluation was unreasonable and the discussions were inadequate for not raising the identified technical shortcomings with the offeror. *Id.* at 17-29.

The contracting officer determined it appropriate to take corrective action with regard to the first issue raised in that earlier CenturyLink protest. AR, Tab 22, Memorandum For Record Regarding Corrective Action, B-419271, Oct. 30, 2020. Specifically, prior to the initial award decision, DHS had utilized the EIS contract pricing tool to determine that AT&T had all RFP-required CLINs on its EIS contract. *Id.* After receipt of CenturyLink's protest, however, the contracting officer discovered that two of AT&T's EIS CLINs no longer appeared on the EIS contract pricing tool. *Id.* DHS requested clarification from GSA, which stated that there may have been a clerical error regarding the information displayed on the EIS contract pricing tool. *Id.* Based on GSA's response that AT&T did not have all CLINs on its EIS contract at the time of task order award, DHS determined the best course of action was to terminate AT&T's task orders, conduct a reevaluation, and make a new best-value determination. *Id.* Also, prior to any new award decision, DHS planned to "re-verify and obtain written confirmation of the apparent awardee's CLINs to ensure that the GSA had not made another clerical error." *Id.* Lastly, the contracting officer stated that "I have reviewed the other [CenturyLink] protest grounds and believe they lack merit." *Id.*; *see also* COS at 4.

***10** DHS subsequently informed our Office that it would take corrective action as follows:

> DHS will terminate the task orders for the convenience of the government; DHS reserves the right to conduct discussions as described in FAR 16.505; DHS will conduct a re-evaluation of proposals; DHS will conduct a best value determination and source selection decision; DHS will re-check and obtain written confirmation of the apparent awardee's CLIN's to ensure that the GSA has not made another clerical error.

AR, Tab 27, DHS Notice of Corrective Action, B-419271, Nov. 9, 2020, at 1. Based on the proposed corrective action, we dismissed the protest as academic. *Qwest Gov't Servs., Inc. d/b/a CenturyLink QGS*, B-419271, Nov. 10, 2020 (unpublished decision).

During its corrective action, DHS held exchanges with all offerors regarding their EIS contracts. COS at 17. For example, on November 23, DHS notified AT&T that it had found one RFP-required CLIN that was not on the offeror's EIS contract and requested AT&T provide information showing that its EIS contract had been modified to include same. *Id.* Similarly, also on November 23, DHS notified CenturyLink that it had found 27 RFP-required CLINs that were not on the offeror's EIS contract and requested CenturyLink provide information showing that the proposed CLINs were added to its EIS contract. *Id.* at 18. The agency also undertook an EIS CLIN validation effort--involving GSA, GSA's EIS pricing vendor, and AT&T--to confirm that all RFP-required CLINs were on the prospective awardee's EIS contract. COS at 21-23; Supp. COS at 9-10, 13-16. "These exchanges did not involve the submission of a revised [task order] proposal to DHS and were part of an administrative CLIN validation process required by the EIS Ordering Guide." Supp. COS at 14. The agency ultimately determined that all required

CLINs were properly awarded on AT&T's EIS contract.[9] AR, Tab 13, PET Report at 1-17; Tab 13a, Addendum to Price Evaluation Report at 1-14.

CenturyLink argues the agency failed to hold equal and meaningful discussions during its corrective action. Protest at 26-29. Additionally, the protester alleges that "the entirety of the [c]orrective [a]ction was neither fair nor equal, and was only engaged in to the extent necessary to allow AT&T to cure its noncompliant proposal."[10] Comments & Supp. Protest at 3. Related thereto, CenturyLink argues that it was improper for the corrective action to only address one issue--regarding the requirement that the awardee have all RFP-required CLINs on its EIS contract prior to task order issuance--without correcting any of the other alleged improprieties. *Id.* at 2, 12. Lastly, CenturyLink argues the agency failed to adhere to its announced corrective action when DHS failed to reevaluate all aspects of the proposals and again made the same selection decision. CenturyLink Supp. Comments at 13.

***11** The agency argues that it did not hold discussions with any offerors during corrective action, but instead held exchanges with all offerors related to the administration of regarding their EIS contracts.[11] MOL at 18-20. The agency also argues that its corrective action was equal and fair, and that it provided an equal opportunity to all offerors to demonstrate that they had modified their EIS contracts with GSA. Supp. MOL at 11-16. DHS further contends that its corrective action was limited to the EIS contract issue, because this was the only aspect of the initial evaluation and award determination that the agency believed required remedying. *Id.* at 7-11. Lastly, DHS argues that the corrective action taken was entirely consistent with the corrective action announced. *Id.* We agree.

As a general rule, contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. *CenturyLink QGS*, *supra* at 4; *Northrop Grumman Sys. Corp.,* B-410990.3, Oct. 5, 2015, 2015 CPD ¶ 309 at 8. The details of a corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. *MSC Indus. Direct Co., Inc.,* B-411533.2, B-411533.4, Oct. 9, 2015, 2015 CPD ¶ 316 at 5; *see Alliant Enter. JV, LLC*, B-410352.4, Feb. 25, 2015, 2015 CPD ¶ 82 at 4 ("[A]n agency's corrective action is reasonable if it is appropriate to remedy the flaw which the agency believes exists in its procurement process."); *Unissant, Inc.*, B-418193.2, Jan. 31, 2020, 2020 CPD ¶ 67 at 4 ("[A]s a general rule, an agency has the discretion to determine its needs and the best way to meet them."); *see also Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982, 994-995 (Fed. Cir. 2018) (finding an agency's corrective action to be reasonable because it was rationally related to procurement defect).

First, we find no merit in CenturyLink's assertion that the agency held unequal and inadequate discussions with offerors during the corrective action, because the agency did not conduct discussions as part of its corrective action. The record reflects that after DHS's initial award decision, AT&T submitted requests to GSA to modify its EIS contract. We have previously determined, however, that this action did not concern the competition for the task order; rather it concerned the administration of AT&T's EIS contract. *See CenturyLink QGS*, B-418556.3, Sept. 8, 2020, 2020 CPD ¶ 293 at 5. As stated in that *CenturyLink QGS* decision:

> ***12** the EIS contract modification submission requirements enable GSA to process necessary modifications before issuance of a task order, ensuring that all of the [ordering] agency's task order requirements are within the scope of the offeror's EIS contract. And, for the [ordering] agency, the EIS contract modification requirement allows the [ordering] agency to track and confirm whether an offeror has the required services on it EIS contract prior to the agency's issuance of the task order. The [EIS contract] modification process did not otherwise affect the agency's evaluation of the task order proposals, or impact the task order competition in any way.

Id. at 5-6.

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Similarly, as the exchanges between DHS and AT&T concerned the scope of the offeror's EIS contract, and were matters of EIS contract administration, they did not constitute discussions regarding the offeror's task order proposal. *Intermarkets Global*, B-400660.12, B-400660.13, May 6, 2011, 2011 CPD ¶ 130 at 6; *Global Assocs. Ltd.*, B-271693, B-271693.2, Aug. 2, 1996, 96-2 CPD ¶ 100 at 4.

We also find no merit in CenturyLink's assertion that the entirety of DHS's corrective action was unequal and unfair. The record reflects that, as a consequence of the earlier protest filed by CenturyLink, the agency learned that AT&T may not have been eligible for task order award because DHS had not confirmed that AT&T had all of the task order required services on its EIS contract, as required by section G.3.2.5 of the EIS contract. In fact, the agency learned the same issue applied equally to CenturyLink, that is, the protester also may not have had all of the task order-required services on its EIS contract. COS at 18. To correct this issue, the agency's corrective action sought to confirm whether each offeror had all of the required services included and priced on its EIS contract. The proposed corrective action did not require, nor allow, for the submission of task order proposal revisions from any offeror--a remedy sought by CenturyLink in order for it to address the shortcomings identified in its technical proposal. We find the agency's chosen approach unobjectionable.

Moreover, we find no merit to CenturyLink's allegation that the agency's corrective action was improper or unfair because it addressed only one issue raised in the earlier protest and not others. The record reflects the agency was concerned that offerors, including AT&T, may not have had all RFP CLINs on their EIS contracts at the time of task order award. Consequently, as part of its corrective action, DHS held exchanges with offerors regarding their EIS contracts, providing all offerors with the opportunity to modify their EIS contracts, and performed an EIS CLIN validation effort to confirm that all RFP-required CLINs were on the prospective awardee's EIS contract. We find the agency's corrective action to be reasonable as it was appropriate to remedy the flaw which the agency believed existed in its procurement process. *Alliant Enter. JV, LLC*, *supra*; *Dell Fed. Sys., L.P. v. United States*, *supra*.

***13** By contrast, DHS found that CenturyLink's remaining protest grounds lacked merit, and therefore, the agency's corrective action did not include conducting discussions or reevaluating technical proposals. In sum, CenturyLink's allegation that its protest grounds here were (self-proclaimed) meritorious ones did not make them so, and there is no requirement that an agency's corrective action remedy flaws alleged in an earlier protest where, as here, no decision on the merits was issued by our Office. *XYZ Corp.*, B-413243.2, Oct. 18, 2016, 2016 CPD ¶ 296 at 3; *SOS Int'l, Ltd.*, B-407778.2, Jan. 9, 2013, 2013 CPD ¶ 28 at 2.

Lastly, we find no merit in CenturyLink's assertion that the agency improperly deviated from its announced corrective action. DHS plainly did not state, as the protester avers, that the agency would reevaluate all aspects of offerors' proposals. A simple review of the agency's notice of corrective action confirms this reading. *See* AR, Tab 27, DHS Notice of Corrective Action, B-419271, Nov. 9, 2020. The mere fact that the best-value tradeoff determination again resulted in the selection of AT&T does not indicate that the agency failed to make a new source selection decision, or that it was somehow improper. *DynCorp Int'l LLC*, B-414647.2, B-44647.3, Nov. 1, 2017, 2017 CPD ¶ 342 at 16.

In sum, CenturyLink's many claims of disparate treatment by the agency in the evaluation of proposals are wholly unsupported by the record and provide no basis on which to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel

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Footnotes

1 GSA's EIS is a multiple-award, indefinite-delivery, indefinite-quantity (IDIQ), contract awarded on July 31, 2017, to provide agencies with telecommunications services on a global basis. AR, Tab 33, GSA EIS IDIQ Contract No. GS00Q17NSD3009 (EIS Contract) § C.1.3. The EIS contract defines services by Core Based Statistical Areas (CBSAs), which are used to group federal user locations into standard geographic areas approximating individual telecommunications markets. *Id.* The EIS contract includes more than 900 CBSAs, and each CBSA includes numerous mandatory and optional services. *Id.* at §§ B.1.2.1.1.1 and J.1.1. Each permissible individual pricing element (*e.g.*, individual mandatory or optional services) within a CBSA is identified by a Contract Line Item Number (CLIN). *Id.* at § B.1.2.1.1.1.

2 The solicitation was subsequently amended three times. Unless stated otherwise, all citations are to the final conformed version of the RFP.

3 The four task orders were for different components within DHS; however, all tasks orders involved the same SOW requirements and evaluation criteria.

4 As the value of the issued task orders (both individually and collectively) was greater than $10 million, the procurement here is within our jurisdiction to hear protests related to the issuance of task orders under IDIQ contracts awarded by civilian agencies. 41 U.S.C. § 4106(f)(1)(B); *Analytic Strategies LLC; Gemini Indus., Inc.*, B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 340 at 4-5.

5 Separately, the TET also identified one aspect of CenturyLink's transition and modernization approach proposal that increased performance confidence (*i.e.*, its proposed use of [DELETED]). AR, Tab 12, TET Report at 8.

6 The TET noted that AT&T had proposed a 180-day schedule "to complete transition and near-term modernization opportunities" (*e.g.*, [DELETED]), and found that AT&T's "approach covers most areas of modernization [that] DHS could reasonably expect to achieve during the transition phase and provides immediate gains to the DHS network environment." AR, Tab 12, TET Report at 6.

7 CenturyLink also alleges that DHS held an unequal exchange with another unsuccessful offeror regarding that offeror's compliance with the RFP's service level agreement requirements, but failed to address this same issue with CenturyLink. Comments & Supp. Protest at 3, 39-40. We need not address the merits of CenturyLink's allegation here, because even if the argument had merit, the protester could not have suffered prejudice based on the agency's action. We have repeatedly found that where an agency conducts discussions with another unsuccessful offeror, but does not conduct discussions with the protester or the awardee, the protester cannot demonstrate prejudice. *See*, *e.g.*, *JHC Tech., Inc.*, B-417786, Oct. 23, 2019, 2019 CPD ¶ 376 at 6 (finding that because Vendor F's quotation was neither advanced further in the competition nor selected for award, protester could not have been prejudiced by exchanges between agency and Vendor F, even if found to be discussions); *Joint Venture Penauillie Italia S.p.A.; Cofathec S.p.A.; SEB.CO S.a.s.; CO.PEL.S.a.s.*, B-298865, B-298865.2, Jan. 3, 2007, 2007 CPD ¶ 7 at 7 n.4.

8 By way of background, the RFP required proposals to comply with the terms and conditions found in GSA's EIS contract. RFP at 5. Section G.3.2.5 (authorization of orders) of the EIS contract provides that an EIS contract holder may compete for an agency task order--even if it does not have all of the agency-required services included on its EIS contract--if the contractor, at the time of its task order proposal submission, submits to GSA a modification adding the missing services (and the associated pricing) to its EIS contract. *See* AR, Tab 33, EIS Contract, § G.3.2.5, at 10-11. Section G.3.2.5 goes on to specifically state that contractors are prohibited from accepting a task order for services that are not on their EIS contract (*i.e.*, until GSA has processed the EIS contract modifications and added the to-be-performed services, and their related pricing, to a firm's EIS contract). *Id.* at 11 ("The contractor shall not accept a [task order] or service order or provision services not on its contract."); *see also* AR, Tab 20, EIS Fair Opportunity and Ordering Guide at 21 (explaining that the ordering contracting officer may not issue a task order until after the contractor has modified its EIS contract to include the particular service or service component specified in the ordering agency's solicitation).

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9 While CenturyLink points to exchanges which DHS held with AT&T after the agency's December 29 award determination, and an excel spreadsheet in which AT&T presented pricing information in a different manner from that in its task order proposal, Comments & Supp. Protest at 14-15, the record reflects that such exchanges did not involve a change to AT&T's task order proposal, including its pricing. Supp. COS at 15-16.

10 Unlike its earlier protest, CenturyLink no longer challenges AT&T's eligibility for task order award or disputes that AT&T possesses all required CLINs on its EIS contract. *See* Protest, *passim*; Comments & Supp. Protest, *passim*.

11 As the "acid test" for deciding whether discussions have been held is whether it can be said that an offeror was provided an opportunity to revise or modify its proposal, *see Allied Tech. Grp., Inc.*, B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 6, we have found that exchanges limited to the administration of an offeror's EIS contract do not constitute discussions. *CenturyLink QGS*, *supra* at 6 n.5.

B- 419271.4 (Comp.Gen.), B- 419271.7, 2021 CPD P 169, 2021 WL 1750373

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152 Fed.Cl. 319
United States Court of Federal Claims.

SUPERIOR OPTICAL LABS, INC., Plaintiff,
v.
The UNITED STATES, Defendant,
and
PDS Consultants, Inc., Intervenor.

No. 20-1497C
|
(Re-issued: February 2, 2021) [1]
|
(Originally Filed: January 22, 2021)

Synopsis

Background: Successful bidder challenged corrective actions, which resulted in cancellation of award, taken by Government Accountability Office in response to intervenor's protest of award of government contract to provide eyeglasses to Department of Veterans Affairs (VA). Successful bidder sought injunction to prevent agency from carrying out its corrective action and to reinstate award.

Holdings: The Court of Federal Claims, Eric G. Bruggink, Senior Judge, held that:

[1] there was no justification for VA to reopen competition and cancel award of contract to successful bidder in response to intervenor's protest;

[2] successful bidder would be irreparably harmed if VA engaged in proposed corrective action;

[3] balance of the hardships favored successful bidder; and

[4] public interest supported injunction.

Motion for injunction granted.

Procedural Posture(s): Review of Administrative Decision; Motion for Preliminary Injunction.

West Headnotes (13)

[1] **Public Contracts** Scope of review
United States Scope of review

Court of Federal Claims reviews actions taken by federal agencies in connection with a procurement or proposed procurement pursuant to the standards set forth in the Administrative Procedures Act. 5 U.S.C.A. § 706.

[2] **Public Contracts** Scope of review
United States Scope of review

In order to be successful on a bid protest, the protestor must show that the challenged agency action was arbitrary, capricious, or otherwise not in accordance with the law; this is rational basis review.

[3] **Public Contracts** Scope of review
United States Scope of review

An agency's corrective action in response to a bid protest will not be set aside if there is a rational basis for it, supported by a coherent and reasonable explanation.

1 Cases that cite this headnote

[4] **Public Contracts** Reconsideration
United States Reconsideration

An agency need not admit an error before taking corrective action in response to a bid protest.

1 Cases that cite this headnote

[5] **Public Contracts** Reconsideration
United States Reconsideration

The corrective action an agency takes in response to a bid protest need only be reasonable under the circumstances.

1 Cases that cite this headnote

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[6] **Injunction** Award of contract; bids and bidders

Court of Federal Claims considers four factors in deciding whether extraordinary relief of injunction is warranted to prevent an agency from carrying out corrective action in response to bid protests: whether plaintiff has succeeded on merits in showing that agency acted irrationally or otherwise illegally, whether plaintiff will suffer irreparable harm absent injunction, balance of hardships to respective parties if injunction is entered, and whether injunction is in public's interest.

[7] **Injunction** Award of contract; bids and bidders

There was no justification for Department of Veterans Affairs (VA) to reopen competition and cancel award of contract to successful bidder in response to intervenor's protest, supporting successful bidder's motion for injunction to prevent VA from carrying out its corrective action and to reinstate award; solicitation was not ambiguous, offerors were not misled, bidding errors were random and not the product of a considered reading of the solicitation, and VA was not at liberty to reject compliant proposal in fair competition simply to generate a lower price absent an independent rationale for doing so.

[8] **Public Contracts** Form and requisites; responsiveness

United States Form and requisites; responsiveness

Although competition in federal procurements is crucial, agencies are not at liberty to reject a compliant proposal in a fair competition simply to generate a lower price, absent some independent rationale for doing so.

[9] **Injunction** Award of contract; bids and bidders

Successful bidder would be irreparably harmed if Department of Veterans Affairs (VA) engaged in proposed corrective action to reopen competition and cancel award of contract to successful bidder in response to intervenor's protest, supporting successful bidder's motion for injunction to prevent VA from carrying out its corrective action and to reinstate award; successful bidder would be forced to compete both against offerors it already bested and, in essence, itself as its price was disclosed to losing bidders, and recompete would have the effect of artificially lowering proposed prices to detriment of successful bidder.

[10] **Injunction** Award of contract; bids and bidders

Balance of the hardships favored successful bidder, supporting successful bidder's motion for injunction to prevent Department of Veterans Affairs (VA) from carrying out its corrective action to reopen competition and to reinstate award; VA would suffer no independent harm if the corrective action was set aside, intervenor had no rightful expectation that it be allowed a chance to correct error in its bid, and successful bidder would be harmed in absence of injunction as its price was disclosed to losing bidders and it would be forced to compete both against offerors it already bested and, in essence, itself in recompete.

[11] **Injunction** Award of contract; bids and bidders

Public interest supported injunction, supporting successful bidder's motion for injunction to prevent Department of Veterans Affairs (VA) from carrying out its corrective action to reopen competition and to reinstate award; public had interest in fair and lawful procurement of goods and services by government, and there was no reasonable rational for VA's corrective action.

[12] **Public Contracts** Bidding and Bid Protests

The public has an interest in the fair and lawful procurement of goods and services by the government.

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[13] **Public Contracts** Reconsideration

Absent a reasonable rationale for corrective action, an offeror may not be forced to compete against itself and other offerors again when it has already won a government contract.

Attorneys and Law Firms

***321** Robert J. Sneckenberg, Washington, DC, for plaintiff. Elizabeth H. Connally, John E. McCarthy Jr., and Rina M. Gashaw, of counsel.

Nathanael B. Yale, Trial Attorney, United States Department of Justice, Civil Division, Commercial Litigation Branch, Washington, DC, with whom were Jennifer B. Dickey, Principal Deputy Assistant Attorney General, Robert E. Kirschman, Jr., Director, Deborah A. Bynum, Assistant Director, for defendant. Natica C. Neely, VA Office of General Counsel, of counsel.

David S. Gallacher, Washington, DC, for intervenor. Emily S. Theriault, Adam A. Bartolanzo, and Daniel J. Alvarado, of counsel.

Post-award bid protest; Corrective action; GAO; Lack of ambiguity; Injunctive factors.

ORDER AND OPINION

BRUGGINK, Judge.

This action is a challenge to the Department of Veterans Affairs' decision to recompete a contract to provide eyeglasses to the VA. Plaintiff was originally awarded the contract. Intervenor protested that award at the Government Accountability Office. The agency took voluntary corrective action in response to the protest, resulting in the cancellation of the award to plaintiff and an announcement that the VA would allow proposal revisions and make a new award decision. Plaintiff challenges the corrective action decisions as arbitrary and capricious. The matter is fully briefed on cross-motions for judgment on the administrative record. As more fully explained below, because the agency lacked a rational basis for its corrective action, we sustain the protest and enjoin the cancellation of the award.

BACKGROUND

On, May 11, 2020, the Department of Veterans Affairs ("VA") issued request for proposals 36C26220R0093 ("RFP" or "solicitation") for a contract to supply eyeglasses that the VA will provide to eligible beneficiaries of its healthcare system in California, Nevada, and New Mexico. The RFP called for a single award of a fixed-price, indefinite-delivery, indefinite-quantity contract to the lowest-priced, technically acceptable offeror. The contract was for one base year with four option years.

The agency required offerors to provide a pricing worksheet with prices for each year of the contract and "two (2) sample sets (labeled as Set 1 and Set 2) of the eyeglass frames offeror[s] propose[ ] to provide under the contract." Administrative Record ("AR") 119. Offers were then ranked by total evaluated price for all five potential years, and then the lowest price offer was evaluated for technical acceptability first. The first technically acceptable proposal would be awarded the contract. *Id.* at 120.

The VA received six separate bids from four offerors. [2] The intervenor here, PDS Consultants, Inc. ("PDS"), submitted three different offers. The other offerors each submitted one proposal. The lowest priced offer, from [ ], was evaluated first but found not to be technically acceptable because it did not submit all the required frame samples. The second-lowest bid was from PDS, its first of three offers, but it too was found not to be technically acceptable due to missing frames in both sample sets. Plaintiff, Superior Optical Labs, Inc. ("Superior"), offered the next lowest price. The VA found Superior's offer to be technically acceptable, and thus, on August 25, 2020, it awarded the contract to plaintiff. The other offerors were notified of the award to Superior by debriefing letter dated August 24, 2020. In the letter, plaintiff's price was disclosed pursuant to FAR part 15.506.

On September 2, 2020, PDS filed a protest with the Government Accountability Office ("GAO"), arguing, among other things, that ***322** the solicitation was unclear with respect to whether offerors were required to submit all of the required frames in each of the two sample sets, i.e., two complete sets of the eyeglass frames being offered. PDS argued that the VA's rating of its first offer ("PDS

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#1") as technically unacceptable was arbitrary because the solicitation did not require that both sample sets of frames each be complete. Alternatively, PDS argued that the RFP was ambiguous with respect to what the agency expected and that the ambiguity was latent. As required by the Competition in Contracting Act ("CICA"), 31 U.S.C. § 3553(d)(3)(A)(iii) (2018) (known as the "CICA stay"), the agency issued a stop work notice to Superior pending the GAO protest.

On September 24, 2020, prior to the agency's response to PDS' protest, the VA informed GAO that it would take corrective action, cancelling the award to Superior, amending the solicitation, and making a new award decision after allowing proposal revisions. AR 925. The agency detailed that it did indeed intend that each offeror would submit two complete sets of all frames being offered due to the imposition of social distancing requirements in response to the COVID outbreak in the United States. In other words, members of the Technical Evaluation Board ("TEB") would not meet together in the same physical location. Thus, having multiple sets of frames would make the evaluators' process smoother and quicker. *Id.* at 926-27. It further explained that this was akin to requiring bidders to submit multiple copies of the same written proposal. *Id.* at 926. The notice nevertheless went on to conclude that the VA "agrees that the section of the solicitation about which Protester complains is subject to more than one reasonable interpretation and that the language at issue is susceptible to both VA's interpretation of the language as well as the understanding that Protester contends it reached." *Id.* The notice went on to state that the "the solicitation [did] not explicitly state[ ] that offerors were required to submit two identical frame kits" nor did it "explicitly state that each sample set of eyeglass frames must independently satisfy each of the technical acceptability criteria described in solicitation." *Id.* at 927. The VA reconsidered the language as a whole and found that it could reasonably be read to require only that each offer contain, across two sets, all of the frames necessary to meet the technical requirements. *Id.* at 927-28. The agency relied on the fact that the solicitation used the plural word "sets" in one place, but then later in the RFP referred to the singular words "sample" and "frame mix." It found this created a latent ambiguity requiring correction for a fair competition.

Superior filed an objection on September 25, 2020, claiming that it would be unduly prejudiced by this late correction of the supposed ambiguity due to its price having already been disclosed to the other offerors. Despite the objection, GAO dismissed the protest as academic.

On October 20, 2020, at plaintiff's behest, VA disclosed all offerors' prices in an attempt to ameliorate the prejudice to Superior from having its price disclosed. Not satisfied, Superior filed the instant action on October 29, 2020. The agency agreed not to proceed with its reevaluation and award in order to give the court time to consider the merits of the protest. The matter is now fully briefed. Oral argument was held telephonically on January 15, 2021.

DISCUSSION

[1] **[2]** We have jurisdiction to review actions taken by federal agencies in connection with a procurement or proposed procurement. 28 U.S.C. § 1491(b) (2018). We review those actions pursuant to the standards set forth in the Administrative Procedures Act, 5 U.S.C. § 706 (2018). 28 U.S.C. § 14941(b)(4) (stating that review under this section would be pursuant to the standards set forth in the APA). In order to be successful, the protestor must thus show that the challenged agency action was arbitrary, capricious, or otherwise not in accordance with the law. *Centech Group, Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009). This is rational basis review. *Impressa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

[3] **[4]** **[5]** The inquiry is unchanged in the corrective action context. *See* ***323** *Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982, 992 (Fed. Cir. 2018). This means that a corrective action will not be set aside if there is a rational basis for it, supported by a "coherent and reasonable explanation." *Id.* The agency need not admit an error before taking corrective action, *ManTech Telecomms. & Info. Sys. Corp. v. United States*, 49 Fed. Cl. 57, 65 (2001), and the corrective action need only be "reasonable under the circumstances." *Sierra Nevada Corp. v. United States*, 107 Fed. Cl. 735, 750 (2012).

[6] Plaintiff seeks an injunction to prevent the agency from carrying out its corrective action and to reinstate the award to Superior. We consider four factors in deciding whether the extraordinary relief of an injunction is warranted under the circumstances: 1) whether plaintiff has succeeded on the merits in showing that the agency acted irrationally or

otherwise illegally, 2) whether plaintiff will suffer irreparable harm absent the injunction, 3) the balance of the hardships to the respective parties if an injunction is entered, and 4) whether an injunction is in the public's interest. *PGBA, LLC . v. United States*, 389 F.3d 1219, 1228-29 (Fed. Cir. 2004). We begin with the first factor.

I. The Corrective Action Was Not Merited

[7] We agree with the plaintiff that the corrective action here is irrational because there was no ambiguity in the solicitation nor does the record support the agency's conclusion that PDS, or any other offeror, was misled. We start by turning to the language of the RFP in question.

A. The Solicitation Was Not Ambiguous

The RFP at Section E.2.3, "Required Submittal for Proposal Evaluations," instructed offerors to submit "two (2) sample sets (labeled as Set 1 and Set 2) of the eyeglass frames offeror proposed to provide under the contract." It further required that each "Offeror's submittal shall separate men's frames, women's frames, and unisex frames into separate containers with each container clearly marked to identify" what was contained therein. *Id.* Bidders were warned that, if they "fail[ed] to submit these samples with their proposals in the manner specified in this paragraph," their proposals might be rejected. *Id.*

The next section, E.3, contained the technical evaluation factor, "Proposed Frame Mix." It stated, "To be found technically acceptable for this evaluation factor, the sample of frames the offeror submitted with its proposal must meet ALL of the following criteria." *Id.*

Frame sample must contain:

- Minimum of 25 men's frames
- Minimum of 25 women's frames
- Minimum of 15 unisex frames
- Minimum of 5 large frame sizes for men's frames (size 54 to 60)
- Minimum of 3 frames with short bow lengths for men's frames (size 125 to 130)
- Minimum of 5 large frame sizes for women's frames (size 54 to 60) • Minimum of 3 frames with short bow lengths for women's frames (size 125 to 130)

Id. The RFP continued with instructions for specific numbers of metal frames and plastic frames. It used the following language to introduce those requirements: "Metal frame mix must include:" and "Plastic frame mix must include:". *Id.* at 119-20. A list of the number of each type of frame required followed.

From these statements, PDS and the agency contrast, as they did to GAO, the use of the plural in Section E.2.3 ("sets") with the use of the singular in Section E.3 ("mix" and "sample"). PDS points out that the word "identical" does not appear in the first section to refer to the sets, but instead the word "submittal" was used thereafter in reference to the sample sets. The use of the singular ("frame sample" and "frame mix") in the following section buttresses the confusion, according to defendant and intervenor. Thus, in their view, the VA could have been asking for two identical, complete sets or it could have been asking for one complete sample broken into two sets.

They argue that this ambiguity was latent because it did not become apparent until after evaluation. Defendant argues in the alternative that, even if patent, the agency was well within its wide discretion to correct ***324** that error after the fact. It is of no note, defendant and intervenor argue, that PDS' protest of a patent ambiguity would have come too late under the Federal Circuit's rule in *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007), because agencies are not so constrained when they take voluntary corrective action. We need not reach that question, however, because we find no ambiguity in the RFP.

The required "submittal" referenced in E.2.3 was to consist of two sample sets, independently labeled as such, containing "the eyeglass frames offeror proposes to provide under the contract." AR 119. Thus, an offeror's submittal was required to contain two sets of the frames it was offering to the VA. The combination of a single submittal and plural sets is thus not only not confusing, it is necessitated by what the agency wanted. There is no reasonable interpretation of this language other than that the VA required two complete sets of frames within a single submittal.

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Contrary to the VA's explanation to GAO, the terms "submittal," "sample" and "mix" do not interject any ambiguity. First, because those terms do not modify the phrase "two (2) sample sets." Second, the word submittal clearly refers to the entire proposal to be submitted. It is in the singular because there is only one proposal, although it includes two sample sets. Third, the use of the singular word "sample" or the phrase "sample set" is fully consistent with the agency's expectation that the "sample," or "sample set" be complete, although duplicated within the proposal. Indeed, the singular terms confirm that the agency expected the individual sample sets to be complete.

There is no rational reason, nor has any been proffered, why offerors would have thought that the agency was asking for incomplete sample sets, even if the two, when combined, might have contained all the required frames. Such a requirement is contrary to the plain reading of the RFP and would only introduce confusion into the process. Moreover, as explained below, PDS' proposal belies any notion that it actually thought it was submitting a complete proposal by providing two incomplete sample sets.

B. Offerors Were Not Misled

An examination of the record reveals that the "interpretation" offered after the fact by PDS to GAO and now to the court was not the basis of its bid. Indeed, none of the unsuccessful offeror's evaluated proposals support the notion that they were led to believe that they could spread out a single frame mix across two independently incomplete sets. PDS' first proposal (PDS #1) contained two sets that were largely identical, but neither was complete. One set was missing [ ]. AR 584 (Source Selection Decision Memorandum). The solicitation required three, but PDS provided [ ]. The other set was missing [ ]. *Id.* The TEB also found [ ].[3] *Id.* The fact that intervenor provided two samples of virtually a complete set of its offered frames is inconsistent with the idea that it believed that the solicitation allowed the sample mix to be spread across the two sets. What possible reason could there be for creating a second set with only one pair or a small handful of glasses? PDS' second offer (PDS #2) further belies the notion. The first set evaluated for PDS #2 contained all of the required frames.[4] *Id.* at 585. PDS did not split its frames across the two sets for its second offer.

Rather than indicate that PDS was misled by an ambiguous requirement, the errors and omissions in PDS #1 indicate a lack of care, not an attempt to spread out a single set of frames across two sets. PDS' only explanation, citing its three distinct offers of differing frames, was that it was trying to show the agency its many offerings by using non-identical sample sets, something it argues it was induced to do by the agency's lack of clarity. Offering the same frames but spread over two sets does not display more wares. ***325** however. Further, the record does not support that this was intervenor's intention. Its first offer contained duplicates of most of its frames, and its second offer contained a complete set. It makes no sense to have done either of these things had PDS intended to split its frame mix across two sets and/or attempted to present a wider sample of offerings. Instead, intervenor's odd presentation suggests only that an error was made unintentionally in the first offer; it does not demonstrate confusion about the terms of the solicitation.

We also note that, with respect to the proposal of the lowest priced offeror, [ ], which was evaluated first and found technically unacceptable, its two sample sets each failed the requirement of containing three men's and three women's short bow frames. AR 583-84. Even combined, [ ]'s two sets would not have met the VA's required frame mix. [ ] would have been short at least two women's short bow frames. This suggests, like PDS #1, that it simply erred and was thus properly not awarded the contract despite its low price.

The unsuccessful offers do not confirm an ambiguity in the solicitation. Rather, the bidding errors appear random, not the product of a considered reading of the solicitation. Defendant and intervenor have provided no explanation that supports an alternative reading of particular terms in any sort of coherent way that explains the way intervenor put together its submissions. This means that we cannot agree that there were any facts supporting an assumption of bidder confusion sufficient to warrant setting aside the award. It appears that the VA simply took PDS' protest allegations at face value without any consideration of whether they were supported by the record. This constitutes irrational conduct.

C. There Is No Other Independent Rationale

Defendant also suggests that its corrective action was reasonable because it was taken to "foster competition" as required by CICA of all federal procurements. Per defendant, because PDS' submission "would have been acceptable under PDS's reasonable interpretation," corrective action was independently justified as taken in pursuit of maximum competition. Def.'s Mot. for J. on the AR 12. This is apparently enough, in defendant's view, to undergird the VA's decision. We disagree.

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[8] It was not until after award and disclosure of the winning bidder's price to its competitors that the agency now discovered this rationale for altering its reading of the RFP. Although competition in federal procurements is crucial, agencies are not at liberty to reject a compliant proposal in a fair competition simply to generate a lower price, absent some independent rationale for doing so. Here, the agency requirements remain unchanged and no additional offers will be solicited.

We find no reasonable basis for the correction adopted by the agency because there was no error that needed correcting. The RFP was not ambiguous and Sections E.2 and E.3 are not in conflict. Offerors were plainly instructed to offer submittals containing two sample sets. It simply makes no sense for those samples to have been different.

Errors were made, but not by Superior. It was thus lawfully awarded the contract. At that point, the parties' legal rights viz-a-viz one another changed. Although the government had the right to terminate the award for convenience or if its needs changed, here that was not the case. The asserted justification for correction was in error. The agency had made an award to a qualified bidder; that fact should have been taken into consideration before exposing the awardee to the unfairness of reopening competition after revealing its bid amount. *See* *Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1382-83 (Fed. Cir. 2012) (affirming the finding that a new competition after the contract had been awarded and price disclosed was, absent some independent justification, arbitrary and prejudicial). Here, we find no justification for the agency to have done so. Plaintiff having established success on the merits, we turn to the other factors relevant to whether the status quo ante should be restored via an injunction.

***326** II. Plaintiff Will Be Irreparably Harmed

[9] We find that plaintiff will be irreparably harmed if the corrective action is allowed because it was the lawful awardee of the contract. Absent an injunction, it will be forced to compete both against the offerors that it already bested and, in essence, itself. Because its price was disclosed to the losing bidders, in a recompete, plaintiff must lower its price or risk the other offerors lowering theirs to beat plaintiff's disclosed price. Here, in fact, plaintiff would likely be forced to lower its price below each of the other offeror's prices because all offeror's prices have been revealed, and it was not the lowest priced offer.

The government argues that the disclosure of all of the offerors' initial prices, at plaintiff's request, obviates this concern. We disagree. This is a lowest-price, technically acceptable procurement. If the agency action has the effect of making more offers technically acceptable, the rational bidder knows that it must now beat those offerors' disclosed prices. The agency's decision thus has the effect of artificially lowering proposed prices to the detriment of a successful awardee.

Defendant is correct that its disclosure of plaintiff's price to the unsuccessful awardees was lawfully done pursuant to FAR part 15.506(d)(2), which instructs the agency to disclose the evaluated price of the successful offer, but that does not end the inquiry. No risk of the harm faced now was assumed by plaintiff when it bid. It is the imposition of an unlawful corrective action that turns what would have been a benign disclosure—absent the corrective action, plaintiff would be performing at the price it offered—to one that is highly detrimental to the plaintiff because of the redo. In this context, that is irreparable harm. *See* *Sheridan Corp. v. United States*, 95 Fed. Cl. 141, 155 (2010); *see also* *Sys. Application*, 691 F.3d at 1383 ("The risk of recompeting for a contract after revelation of one's price calculations to competitors, however, does not extend to a contract fairly competed and won on the first solicitation.").

III. The Balance of the Hardships Favors Plaintiff

[10] The irreparable harm to plaintiff established, we consider the balance of harms. Defendant has not suggested any independent harm that the VA will suffer should the corrective action be set aside. Although it mentions in passing that it may acquire the contract at a lower price after a new award decision, to its credit, defendant does not argue that it will be harmed monetarily if its corrective action is set aside. PDS would not be harmed because its lowest priced offer was rightfully found to be technically unacceptable. It has no rightful expectation that it be allowed a chance to correct its error. Absent an injunction, only plaintiff is harmed. The balance of the hardships favor plaintiff.

IV. The Public's Interest

[11] **[12]** **[13]** As always, the public has an interest in the fair and lawful procurement of goods and services by

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the government. Absent a reasonable rationale for corrective action, an offeror may not be forced to compete against itself and other offerors again when it has already won the contract. The public interest favors an injunction.

CONCLUSION

The VA erred when it accepted intervenor's implausible protest at GAO. The RFP is not amenable to reasonable interpretations other than the one the agency admittedly intended: "two (2) sample sets ... of the eyeglass frames offeror proposes to provide." AR 119. The solicitation provided no reason to think that the individual sets could be incomplete. There was no ambiguity, latent or patent, nor do the offerors' proposals suggest otherwise. Plaintiff, on the other hand, was harmed by the VA's corrective action, and absent an injunction, its injury will be irreparable. The balance of harms likewise favors relief. The public interest weighs in favor of not allowing an unduly prejudicial do-over for no valid reason. Plaintiff's motion for judgment on the administrative record is thus granted. Defendant's and intervenor's cross-motions are denied. Accordingly, the following is ordered:

1. The Department of Veterans Affairs is hereby enjoined from the corrective ***327** action that it announced to GAO in its September 24, 2020 notice of corrective action.

2. The agency must reinstate the award to plaintiff and is prohibited from recompeting the contract absent a lawful reason to do so.

3. The Clerk of Court is directed to enter judgment for plaintiff.

4. Costs to plaintiff.

All Citations

152 Fed.Cl. 319

Footnotes

1 This opinion was originally issued under seal to afford the parties an opportunity to propose redactions. They have done so. Redactions appear in brackets below.

2 The VA also received one late proposal and one proposal from an offeror that was not properly registered with the VA as a service-disabled veteran owned small business. Neither of these offers were considered.

3 Intervenor has not explained why it provided two [ ]. This provides further support for the conclusion that PDS simply made errors in its submission.

4 It was not selected for award, however, because plaintiff's offer was lower in price than PDS #2. It is not clear why the agency examined this offer at all, as it was higher in price than Superior's.

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KeyCite Blue Flag – Appeal Notification
Appeal Filed by SAGAM SECURITE SENEGAL v. US, Fed.Cir., September 2, 2021

154 Fed.Cl. 653
United States Court of Federal Claims.

SAGAM SECURITE SENEGAL, Plaintiff,
v.
The UNITED STATES, Defendant.

No. 21-1138C
|
(Filed Under Seal: June 25, 2021)
|
(Reissued for Publication: July 26, 2021) *

Synopsis

Background: Incumbent contractor filed pre-award bid protest, challenging cancellation of solicitation by Department of State to provide local guard services to United States embassy in Senegal. Parties cross-moved for judgment on administrative record, and government moved to dismiss one count of complaint.

Holdings: The Court of Federal Claims, Margaret M. Sweeney, Senior Judge, held that:

[1] claim that improper discussions were conducted was moot;

[2] government waived ripeness argument;

[3] agency's disclosure of bid information violated Procurement Integrity Act (PIA) and fundamental fairness regulations;

[4] disqualification of competing bidder was required to address improper disclosure;

[5] incumbent was prejudiced by failure to disqualify competing bidder; and

[6] permanent injunctive relief was warranted.

Plaintiff's motion granted; defendant's motions granted in part and denied in part.

Procedural Posture(s): Review of Administrative Decision; Motion for Judgment on Administrative Record; Motion to Dismiss; Motion for Permanent Injunction.

West Headnotes (52)

[1] **Federal Courts** Mootness

Mootness is a threshold jurisdictional issue in the Court of Federal Claims.

[2] **Federal Courts** Inception and duration of dispute; recurrence; "capable of repetition yet evading review"

Under the mootness doctrine, when, during the course of litigation, it develops that the questions originally in controversy between the parties are no longer at issue, the case should generally be dismissed by the Court of Federal Claims.

[3] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

To the extent that a bid protest ground challenges a course of action that the federal procuring agency has already abandoned, that protest ground is moot and must be dismissed.

[4] **United States** Judgment on administrative record

In ruling on motions for judgment on the administrative record, the Court of Federal Claims asks whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record.

[5] **United States** Judgment on administrative record

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Because the Court of Federal Claims makes factual findings from the record evidence, judgment on the administrative record is properly understood as intending to provide for an expedited trial on the record.

[6] **Public Contracts** Scope of review

United States Scope of review

The proper standard of review to be applied in bid protest cases is provided by the Administrative Procedure Act (APA), pursuant to the Tucker Act, and thus, Court of Federal Claims will set aside the agency action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.A. § 706(2)(A); 28 U.S.C.A. § 1491(b)(4).

[7] **Public Contracts** Scope of review

United States Scope of review

Under the Administrative Procedure Act (APA), Court of Federal Claims may set aside a procurement action if (1) the procurement official's decision lacked a rational basis, or (2) the procurement procedure involved a violation of regulation or procedure. 5 U.S.C.A. § 706(2)(A).

[8] **Public Contracts** Scope of review

Public Contracts Evidence

United States Scope of review

United States Evidence

Under the Administrative Procedure Act (APA), Court of Federal Claims reviews a bid protest challenging a federal procurement to determine whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion, and the disappointed bidder bears a heavy burden of showing that the award decision had no rational basis. 5 U.S.C.A. § 706(2)(A).

[9] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

Under the Administrative Procedure Act (APA), when a bid protest is brought on the ground that the procurement procedure involved a violation of regulation or procedure, the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations. 5 U.S.C.A. § 706(2)(A).

[10] **Public Contracts** Scope of review

United States Scope of review

In a bid protest challenging a federal procurement, examples of arbitrary and capricious actions, under the Administrative Procedure Act (APA), include when the federal procuring agency entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 5 U.S.C.A. § 706(2)(A).

[11] **Public Contracts** Acceptance or Rejection

United States Acceptance or Rejection

Federal procurement officials are entitled to exercise discretion upon a broad range of issues confronting them in the procurement process.

[12] **Public Contracts** Scope of review

United States Scope of review

Court of Federal Claims' review of a federal procuring agency's decision is highly deferential.

[13] **Public Contracts** Evidence

United States Evidence

In a challenge to a negotiated procurement, the bid protestor's burden of proving that the award

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of the federal contract was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law is greater than in other types of bid protests. 5 U.S.C.A. § 706(2)(A).

[14] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

In addition to showing a significant error in the federal procurement process, a bid protestor must show that the error prejudiced it.

[15] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

To establish prejudice, a bid protester must show that there was a substantial chance it would have received the award of the federal contract absent the alleged procurement error.

[16] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

The test for a bid protestor to establish prejudice is more lenient than showing actual causation, that is, showing that but for the errors the protestor would have won the federal contract.

[17] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Bid protestor's claim that Department of State conducted improper discussions with competing bidder for contract to provide local guard services to United States embassy in Senegal in attempt to steer award of contract to bidder was rendered moot by rescission of award.

[18] **Public Contracts** Scope of review

United States Scope of review

The Administrative Procedure Act's (APA) arbitrary and capricious standard of review for bid protests encompasses a claim for against the federal agency for breach of its duty of good faith and fair dealing in the procurement. 5 U.S.C.A. § 706(2)(A).

[19] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Government waived argument that bid protestor's challenge to Department of State's issuance of new solicitation to provide local guard services to United States embassy in Senegal was not ripe, where government made argument for first time in reply brief, rather than in its cross-motion for judgment on administrative record after protestor squarely raised in its opening brief its objection to new solicitation issued by Department of State.

[20] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Even if government had not waived its ripeness argument, bid protestor's challenge to Department of State's issuance of new solicitation to provide local guard services to United States embassy in Senegal was ripe, since State's issuance of new solicitation was part and parcel of its cancellation of tainted prior solicitation, and in letters announcing cancellation of tainted solicitation, State informed bid protestor and competing bidder that new solicitation would issue in near future.

[21] **Public Contracts** Good faith; fairness

United States Good faith; fairness

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Incumbent contractor's bid elements, related to its compliance with and understanding of local laws and labor agreements in Senegal, that contracting officer (CO) disclosed to competing bidder for contract to provide local guard services at United States embassy in Senegal, constituted "proposal information" within definition of "Cost or pricing data," in violation of Procurement Integrity Act (PIA) and fundamental fairness regulations, prohibiting procurement official from disclosing bidder's competition-sensitive proposal features to competing bidder; information was not general reference to publicly available laws and agreements, but rather, each of incumbent's citations to laws and agreements was linked to specific aspects of contract performance and costs that were essential to bid. 41 U.S.C.A. § 2101(2)(A); 48 C.F.R. §§ 1.102-2(c)(3), 1.602-2(b), 3.101-1.

[22] **Public Contracts** Scope of review

United States Scope of review

Court of Federal Claims may set aside a federal procurement action, such as a corrective action, if the procurement official's decision lacked a rational basis.

[23] **Public Contracts** Reconsideration

United States Reconsideration

A federal agency's corrective action in a procurement only requires a rational basis for its implementation; in other words, the rational basis review for agency corrective actions is highly deferential and is satisfied if the agency provided a coherent and reasonable explanation of its exercise of discretion.

[24] **Public Contracts** Scope of review

United States Scope of review

Under the Administrative Procedure Act's (APA) arbitrary and capricious standard of review of an agency's procurement action, Court of Federal Claims will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. 5 U.S.C.A. § 706(2)(A).

[25] **Public Contracts** Reconsideration

United States Reconsideration

A federal procuring agency is not legally required to address every corrective action option, but rather to provide a reasonable corrective action and adequately explain its reasoning for doing so.

[26] **Public Contracts** Reconsideration

United States Reconsideration

Department of State lacked coherent and reasonable explanation for corrective action canceling solicitation to provide local guard services to United States embassy in Senegal, rather than disqualifying competing bidder, after contracting officer (CO) violated Procurement Integrity Act (PIA) and fundamental fairness regulations by disclosing incumbent contractor's bid information to competing bidder; although disqualification was severe sanction, only reasonable corrective action to remedy PIA violation was to disqualify bidder from competition, as cancellation followed by issuance of new solicitation would perpetuate procurement error so that competing bidder could continue to unfairly benefit from CO's violation of PIA and unfairness to incumbent by disclosing its cost and pricing data. 41 U.S.C.A. § 2101(2)(A); 48 C.F.R. §§ 1.102-2(c)(3), 1.602-2(b), 3.101-1, 3.104-7(d)(1)(i).

[27] **Public Contracts** Evaluation process

United States Evaluation process

Most contracting officers (CO) safeguard the proposal information sent to them by offerors and work diligently to prevent, rather than to initiate, inappropriate disclosures of this information during the procurement process.

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[28] **Public Contracts** Good faith; fairness

United States Good faith; fairness

Most procuring agencies take steps to remedy a Procurement Integrity Act (PIA) violation, once the facts of the violation come to light, instead of ignoring the harm the PIA violation caused. 41 U.S.C.A. § 2101(2)(A).

[29] **Public Contracts** Reconsideration

United States Reconsideration

Under the rational basis standard, a procuring agency's corrective action must be rationally based and not contrary to law.

[30] **Public Contracts** Reliability and responsibility of bidder

United States Reliability and responsibility of bidder

A contracting officer has broad authority to protect the integrity of the procurement process, including the authority to disqualify an offeror based on impropriety or the appearance of impropriety in the procurement. 48 C.F.R. § 3.104-7(d)(1)(ii).

[31] **Public Contracts** Reliability and responsibility of bidder

United States Reliability and responsibility of bidder

A contracting officer's power to disqualify offerors so as to cure an appearance of impropriety must yield to statutory mandates requiring the public release of information held by government agencies. 48 C.F.R. § 3.104-7(d)(1)(ii).

[32] **Public Contracts** Reliability and responsibility of bidder

United States Reliability and responsibility of bidder

In the procurement integrity context, a contracting officer may not disqualify an offeror in the absence of facts showing that an impropriety or appearance of impropriety occurred. 48 C.F.R. § 3.104-7(d)(1)(ii).

[33] **Public Contracts** Conditions and restrictions on bidders

United States Conditions and restrictions on bidders

Disqualification of a bidder due to a tainted federal procurement process is a tool that can level the competitive playing field. 48 C.F.R. § 3.104-7(d)(1)(ii).

[34] **Public Contracts** Good faith; fairness

United States Good faith; fairness

Although disqualification of a bidder for a federal contract may seem like a severe sanction, at times it is the only remedy that can reasonably address a Procurement Integrity Act (PIA) violation. 41 U.S.C.A. § 2101(2)(A); 48 C.F.R. § 3.104-7(d)(1)(ii).

[35] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

Incumbent contractor was prejudiced by Department of State's corrective action that lacked rational basis, by canceling solicitation to provide local guard services to United States embassy in Senegal, rather than disqualifying competing bidder, after contracting officer (CO) violated Procurement Integrity Act (PIA) and fundamental fairness regulations by disclosing incumbent contractor's bid information to competing bidder, since incumbent had substantial chance of receiving contract award if Department had crafted rational corrective action and disqualified competing bidder from competition under tainted solicitation, rather than canceling solicitation, as incumbent was only other bidder in competitive range. 41

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U.S.C.A. § 2101(2)(A); 48 C.F.R. §§ 1.102-2(c)(3), 1.602-2(b), 3.101-1.

[36] **Injunction** Award of contract; bids and bidders

Court of Federal Claims has the authority to award injunctive relief in a bid protest pursuant to the Tucker Act. 28 U.S.C.A. § 1491(b)(2).

[37] **Injunction** Injunctions against government entities in general

In determining whether to issue a permanent injunction, Court of Federal Claims must consider whether: (1) plaintiff has succeeded on the merits, (2) plaintiff will suffer irreparable harm if the court withholds injunctive relief, (3) the balance of hardships favors the grant of injunctive relief, and (4) it is in the public interest to grant injunctive relief.

[38] **Injunction** Preponderance of evidence

Bid protestor challenging a federal procurement bears the burden of establishing the factors for permanent injunctive relief by a preponderance of the evidence.

[39] **Injunction** Award of contract; bids and bidders

None of the four factors, taken individually, is dispositive, in granting a permanent injunction in a bid protest challenging a federal procurement, and a weakness of the showing regarding one factor may be overborne by the strength of the others.

[40] **Injunction** Award of contract; bids and bidders

The absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned the other factors, to justify the denial of injunctive relief in a bid protest challenging a federal procurement.

[41] **Injunction** Award of contract; bids and bidders

An award of injunctive relief is within the discretion of the Court of Federal Claims in a bid protest challenging a federal procurement.

[42] **Injunction** Award of contract; bids and bidders

The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the bid protestor challenging a federal procurement must show a likelihood of success on the merits rather than actual success.

[43] **Injunction** Award of contract; bids and bidders

With respect to the irreparable injury factor for a permanent injunction, the relevant inquiry is whether the bid protestor challenging a federal procurement has adequate remedy in the absence of an injunction.

[44] **Injunction** Award of contract; bids and bidders

Incumbent contractor would suffer irreparable harm absent permanent injunction preventing Department of State from canceling solicitation to provide local guard services to United States embassy in Senegal, rather than disqualifying competing bidder, after contracting officer (CO) violated Procurement Integrity Act (PIA) and fundamental fairness regulations by disclosing incumbent contractor's bid information to competing bidder, since incumbent would lose ability to fairly compete for contract either through tainted solicitation or new solicitation.

41 U.S.C.A. § 2101(2)(A); 48 C.F.R. §§ 1.102-2(c)(3), 1.602-2(b), 3.101-1.

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[45] **Injunction** Award of contract; bids and bidders

A lost opportunity to compete for a federal contract and the attendant inability to obtain the profits expected from the contract can constitute irreparable injury required for issuance of a permanent injunction.

[46] **Injunction** Award of contract; bids and bidders

In addition to considering whether a bid protestor would suffer an irreparable injury absent a permanent injunction, Court of Federal Claims must weigh the irreparable harm the protestor would suffer without an injunction against the harm an injunction would inflict on the government.

[47] **Injunction** Award of contract; bids and bidders

Balance of hardships weighed in favor of permanent injunction preventing Department of State from canceling solicitation to provide local guard services to United States embassy in Senegal, rather than disqualifying competing bidder, after contracting officer (CO) violated Procurement Integrity Act (PIA) and fundamental fairness regulations by disclosing incumbent contractor's bid information to competing bidder, since harm to incumbent from lost opportunity to fairly compete for up to five years of contract performance and to earn profits outweighed self-inflicted harm to government from additional procurement delays and costs. 41 U.S.C.A. § 2101(2)(A); 48 C.F.R. §§ 1.102-2(c)(3), 1.602-2(b), 3.101-1.

[48] **Injunction** Injunctions against government entities in general

When employing the extraordinary remedy of an injunction, Court of Federal Claims should pay particular regard for public consequences of doing so.

[49] **Injunction** Award of contract; bids and bidders

On a motion for a permanent injunction in a bid protest, there is an overriding public interest in preserving the integrity of the procurement process by requiring the federal government to follow its procurement regulations.

[50] **Injunction** Award of contract; bids and bidders

Public interest in fair procurement process supported grant of permanent injunction preventing Department of State from canceling solicitation to provide local guard services to United States embassy in Senegal, rather than disqualifying competing bidder, after contracting officer (CO) violated Procurement Integrity Act (PIA) and fundamental fairness regulations by disclosing incumbent contractor's bid information to competing bidder. 41 U.S.C.A. § 2101(2)(A); 48 C.F.R. §§ 1.102-2(c)(3), 1.602-2(b), 3.101-1.

[51] **Injunction** Award of contract; bids and bidders

Permanent injunctive relief would be tailored to minimize harm to government, private parties, and public interest by restoring competition to its status before cancellation of Department of State's solicitation for local guard services to United States embassy in Senegal, due to contracting officer's (CO) violation of Procurement Integrity Act (PIA) and fundamental fairness regulations by disclosing incumbent contractor's bid information to competing bidder, and thus, Court of Federal Claims would enjoin cancellation of solicitation, enjoin any resolicitation of requirement, disqualify competing bidder as beneficiary of improperly disclosed information, and require agency to award contract to incumbent as

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only remaining offeror in competitive range if found to be responsible offeror. 41 U.S.C.A. § 2101(2)(A); 48 C.F.R. §§ 1.102-2(c)(3), 1.602-2(b), 3.101-1.

[52] **Public Contracts** Determination and disposition

United States Determination and disposition

Selection of a contractor among offerors and award of a federal contract are improper exercises of the authority of the Court of Federal Claims.

Attorneys and Law Firms

***658** Thomas A. Coulter, Washington, DC, for plaintiff.

James W. Poirier, United States Department of Justice, Washington, DC, for defendant.

Preaward Bid Protest; Challenge to Cancellation of Solicitation and Resolicitation; Mootness; Cross-Motions for Judgment on the Administrative Record; Improper Disclosure of Protestor's Proposal Information to Competitor; Prejudice; Permanent Injunction

SWEENEY, Senior Judge

OPINION AND ORDER

In this preaward bid protest, plaintiff SAGAM Sécurité Senegal ("SAGAM") challenges the cancellation of a solicitation by the United States Department of State ("State" or "agency"). Specifically, SAGAM alleges that State improperly disclosed portions of SAGAM's proposal to Torres-SAS Security LLC Joint Venture ("Torres") and then erred when it cancelled the solicitation. According to SAGAM, the appropriate remedy for the agency's improper disclosure was to disqualify Torres from the competition for the contract requirement. Before the court are the parties' cross-motions for judgment on the administrative record, as well as defendant's motion to dismiss one count of SAGAM's complaint as moot. As explained below, the court grants defendant's motion for partial dismissal, grants SAGAM's motion for judgment on the administrative record, denies defendant's cross-motion for judgment on the administrative record, and enters a permanent injunction.

I. BACKGROUND

A. The Competition Resulting in an Award to Torres

For approximately thirty-five years, SAGAM has been providing local guard services to the United States embassy in Dakar, Senegal. ***659** Compl. ¶ 5. State issued Solicitation No. 19AQMM18R0332 for the continuation of these services on April 19, 2019, and amended the solicitation three times. Administrative R. ("AR") 1-438. The awardee would perform contract services for a base year, with the possibility of extending performance for four option years. Id. at 329. Proposals were due on July 15, 2019. Id. at 412. Award would be made to the "Lowest Price Technically Acceptable" proposal. Id. at 432.

Three offerors submitted proposals: SAGAM, Torres, and SAKOM Services WI LLC ("SAKOM"). Id. at 1433. None of the proposals was acceptable to State as submitted. Id. at 1434, 1437, 1439. Although the agency believed that both SAGAM and Torres could render their proposals acceptable through discussions, SAKOM's proposal was eliminated from the competitive range. Id. at 1441-42. State sent round-one discussion letters to SAGAM and Torres on August 23, 2019. Id. at 1444-51. Proposal revisions were sent to the agency on August 30, 2019. Id. at 1452-1980. Once the revised proposals were evaluated, both SAGAM and Torres were deemed to have submitted acceptable proposals. Id. at 2014.

State then initiated round-two discussions with both offerors. Id. at 2016-21. It sent discussion letters on December 3, 2019, requesting further information and a "best and final offer" from each offeror by December 13, 2019. Id. at 2016, 2021. Of primary relevance to this protest, State included a number of very specific items in its round-two discussion letter with Torres that disclosed specific elements of SAGAM's proposal. Id. at 2018-21. The round-two discussion letter sent to Torres was markedly more detailed and comprehensive than the brief discussion letter sent to SAGAM. Compare id. at 2016, with id. at 2018-21.

Once State received the final, revised proposals sent by SAGAM and Torres, it chose Torres as the awardee because of Torres's lower price. Id. at 2345-46. The agency notified SAGAM on March 10, 2020, that Torres had been selected for award, and disclosed Torres's overall price as part of its debriefing of SAGAM on March 12, 2020. Id. at 2350-53. The cost savings to State for awarding the contract to Torres rather than to SAGAM, based on the evaluated prices of the offerors, was approximately twenty-two percent. Id. at 2352.

B. The First Corrective Action Taken by State

On March 17, 2020, SAGAM lodged a protest at the Government Accountability Office ("GAO") to challenge the agency's award decision. Id. at 2354-72, 2421-2574. Of relevance here, SAGAM alleged that Torres's employee compensation plan was not technically acceptable because Torres's price was "unreasonable and unrealistic." Id. at 2356. On April 8, 2020, State filed a "Notice of Corrective Action," informing the GAO that the agency would "evaluat[e] the offerors' compensation plans; [and] if necessary, conduct[ ] discussions and evaluat[e] final proposal revisions; and, mak[e] a new award decision." Id. at 2376. In consequence, the GAO dismissed the protest as academic on April 14, 2020. Id. at 2378.

There is no documentation in the record as to State's corrective action between April 14, 2020, and November 18, 2020, when an internal memorandum was circulated by the contracting officer ("CO") on the topic of a "possible Procurement Integrity Act violation" in this procurement. [1] Id. at 2385. Therein, the CO acknowledged that she "took information from SAGAM's compensation plan to request additional clarifications regarding [Torres's] compensation plan." Id. The CO also concluded that the disclosure caused an "impact on the procurement," a view that was shared by the contracting hierarchy at State. Id. at 2386-87. At the conclusion of the CO's memorandum, a box was checked to indicate that the agency's Head of Contracting Activity ("HCA") concurred with her assessment that a procurement integrity violation had an impact on the procurement, and further stated that "the contacting officer must cancel the solicitation." Id. at 2387.

*660 C. The Second Corrective Action Taken by State

On December 2, 2020, State emailed SAGAM a "Notice of Solicitation Cancellation." Id. at 2390. As part of that notice, the agency stated that the "solicitation [wa]s being cancelled following a determination by the Department of State HCA that the Department violated the [PIA] and that the violation impacted the procurement." Id. The agency also announced its intention to issue a new solicitation "in the near future." Id. SAGAM was invited to compete, once again, for the contract requirement. Id. Although SAGAM attempted to protest the cancellation of the solicitation at the GAO, the GAO dismissed the protest as untimely. Id. at 2417-20. The GAO's decision issued on March 22, 2021. Id.

D. This Protest

On March 30, 2021, SAGAM filed a protest in this court challenging the cancellation of the solicitation by State. Although there are a number of grounds stated in SAGAM's complaint, the principal contention advanced by SAGAM is that State's cancellation decision was arbitrary and capricious. Compl. ¶¶ 11, 32-44. Defendant argues that the cancellation decision was lawful and not arbitrary, and that SAGAM's protest ground related to the impropriety of the contract award to Torres, later rescinded by State, is moot. At the conclusion of briefing, the court held oral argument on June 24, 2021. This matter is now ripe for a ruling.

II. DISCUSSION

A. Bid Protest Standard of Review

[1] [2] [3] Defendant seeks the dismissal of Count II of the complaint on mootness grounds. Mootness is a threshold jurisdictional issue. Myers Investigative & Sec. Servs., Inc. v. United States, 275 F.3d 1366, 1369 (Fed. Cir. 2002). "When, during the course of litigation, it develops that ... the questions originally in controversy between the parties are no longer at issue, the case should generally be dismissed." Chapman L. Firm Co. v. Greenleaf Constr. Co., 490 F.3d 934, 939 (Fed. Cir. 2007). To the extent that a bid protest ground challenges a course of action that the agency has already abandoned, that protest ground is moot and must be dismissed. See, e.g., Peraton Inc. v. United States, 146 Fed. Cl. 94, 101 (2019) (dismissing as moot a challenge to an initial

corrective action that was superseded by a revised corrective action).

[4] **[5]** SAGAM and defendant have also filed cross-motions for judgment on the administrative record. In ruling on such motions, "the court asks whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record." A & D Fire Prot., Inc. v. United States, 72 Fed. Cl. 126, 131 (2006) (citing Bannum, Inc. v. United States, 404 F.3d 1346, 1356 (Fed. Cir. 2005)). Because the court makes "factual findings ... from the record evidence," judgment on the administrative record "is properly understood as intending to provide for an expedited trial on the record." Bannum, 404 F.3d at 1356.

[6] **[7]** **[8]** **[9]** **[10]** The court reviews challenged agency conduct pursuant to the standards set forth in 5 U.S.C. § 706. 28 U.S.C. § 1491(b)(4). Specifically, "the proper standard to be applied in bid protest cases is provided by 5 U.S.C. § 706(2)(A): a reviewing court shall set aside the agency action if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " Banknote Corp. of Am. v. United States, 365 F.3d 1345, 1350 (Fed. Cir. 2004). Under this standard, the court

> may set aside a procurement action if "(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." A court reviews a challenge brought on the first ground "to determine whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion, and the disappointed bidder bears a heavy burden of showing that the award decision had no rational basis." "When a challenge is brought on the second ground, the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations."

Centech Grp., Inc. v. United States, 554 F.3d 1029, 1037 (Fed. Cir. 2009) (quoting ***661** Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332-33 (Fed. Cir. 2001)); accord Savantage Fin. Servs., Inc. v. United States, 595 F.3d 1282, 1286-87 (Fed. Cir. 2010) (providing that a protestor has the "burden of showing that the agency's decision ... is so plainly unjustified as to lack a rational basis"); Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054, 1058 (Fed. Cir. 2000) (stating that the arbitrary and capricious standard "requires a reviewing court to sustain an agency action evincing rational reasoning and consideration of relevant factors"). Examples of arbitrary and capricious actions include "when the agency 'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.' " Ala. Aircraft Indus., Inc.-Birmingham v. United States, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

[11] **[12]** **[13]** Procurement officials " 'are entitled to exercise discretion upon a broad range of issues confronting them' in the procurement process." Impresa, 238 F.3d at 1332 (quoting Latecoere Int'l, Inc. v. U.S. Dep't of the Navy, 19 F.3d 1342, 1356 (11th Cir. 1994)). Thus, the court's review of a procuring agency's decision is "highly deferential." Advanced Data Concepts, 216 F.3d at 1058; see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) ("The court is not empowered to substitute its judgment for that of the agency."). Furthermore, in a challenge to a negotiated procurement, the "protestor's burden of proving that the award was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law is greater than in other types of bid protests." Galen Med. Assocs., Inc. v. United States, 369 F.3d 1324, 1330 (Fed. Cir. 2004).

[14] **[15]** **[16]** In addition to showing "a significant error in the procurement process," a protestor must show "that the error prejudiced it." Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed. Cir. 1996); accord Bannum, 404 F.3d at 1351 (holding that if the procuring agency's decision lacked a rational basis or was made in violation of the applicable statutes, regulations, or procedures, the court must then "determine, as a factual matter, if the bid protester was prejudiced by that conduct"). "To establish prejudice ..., a protester must show that there was a 'substantial chance' it would have received the contract award absent the alleged error." Banknote, 365 F.3d at 1351 (quoting Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1086 (Fed. Cir. 2001)); see also Data Gen., 78 F.3d at 1562

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("[T]o establish prejudice, a protester must show that, had it not been for the alleged error in the procurement process, there was a reasonable likelihood that the protester would have been awarded the contract."). The test for establishing prejudice "is more lenient than showing actual causation, that is, showing that but for the errors [the protestor] would have won the contract." Bannum, 404 F.3d at 1358.

B. Analysis

[17] As a threshold matter, defendant's motion for partial dismissal of the complaint is quickly resolved; indeed, SAGAM did not respond to defendant's mootness argument in its response brief. The contract award to Torres is no longer a live issue in this protest. Even if the agency conducted improper discussions with Torres in an attempt "to steer an award to Torres," as alleged in Count II of the complaint, Compl. 16, the award to Torres in March 2020 has been rescinded–rendering this protest ground moot. [2] Defendant's motion to dismiss Count II of the complaint is granted.

[18] Turning to the merits of this protest, SAGAM challenges the rationality of the second corrective action taken by State–the cancellation of the solicitation with intent to issue a new solicitation. In SAGAM's view, State's only rational course of action, once the PIA violation was uncovered by the agency's ***662** legal staff, was to disqualify Torres from the competition. SAGAM also asserts that the cancellation decision violated various fairness provisions in the Federal Acquisition Regulation ("FAR"), codified in Title 48 of the Code of Federal Regulations. [3]

Defendant contends that SAGAM's protest lacks merit and requests the entry of judgment in its favor. [4] In addition, defendant argues for the first time in its reply brief that SAGAM's challenge to the issuance of a new solicitation is not ripe. The latter argument must be rejected, for two reasons.

[19] First, the argument is untimely. SAGAM's objection to the issuance of a new solicitation by State, which is the necessary consequence of State cancelling the current solicitation, was squarely raised in SAGAM's opening brief. The time for asserting any ripeness argument in opposition to this aspect of SAGAM's protest was when defendant filed its cross-motion for judgment on the administrative record. Because defendant's ripeness argument was first raised in a reply brief, it is waived and will not be considered by the court. See, e.g., Novosteel SA v. United States, 284 F.3d 1261, 1274 (Fed. Cir. 2002) (treating an argument raised for the first time in a reply brief as waived).

[20] Second, there is no ripeness problem here. State's issuance of a new solicitation is part and parcel of its cancellation of the tainted solicitation. In the letters announcing the cancellation of the tainted solicitation, State informed both Torres and SAGAM that a new solicitation would issue "in the near future." AR 2390-91. This proposed agency action, cancellation combined with the issuance of a new solicitation, is ripe and subject to protest. See, e.g., Sys. Application & Techs., Inc. v. United States, 691 F.3d 1374, 1381 (Fed. Cir. 2012) ("This court has made clear that bid protest jurisdiction arises when an agency decides to take corrective action even when such action is not fully implemented."). Even if defendant's ripeness argument were not waived the court would necessarily reject it.

The principal question before the court, then, is a narrow one: Was State's decision to cancel the tainted solicitation and issue a new solicitation for the requirement rational in light of the CO's PIA violation? The court first examines the error that provoked the agency's cancellation decision.

1. The CO's Disclosure of SAGAM's Proposal Information Was Improper

[21] It is undisputed that the CO erred when she shared elements of SAGAM's proposal with Torres so that Torres could improve its proposal. [5] See Def.'s Cross-Mot. 1 ("There is no dispute about the fact that the contracting officer made a mistake during the course of the procurement, and that corrective action is appropriate."), 31 (stating that the CO's November 2020 report "described errors by the contracting officer during the price evaluation in the last months of 2019"), 32 (stating that the CO "supplied SAGAM's proposal information to Torres"), ***663** 34 (noting that the CO's November 2020 report "described a disclosure of proposal information by the contracting officer"). State acknowledged in its communication to SAGAM that the disclosure was a PIA violation, and the CO has since acknowledged in this litigation that her disclosure of SAGAM's proposal information to Torres was a PIA violation. Def.'s Suppl. Br. Ex. 1. Nevertheless, defendant resists such a characterization and instead argues that it is "perhaps a close question"

whether the CO did, indeed, violate the PIA. Def.'s Cross-Mot. 27.

The PIA provisions that forbid a disclosure of the type made here are found at 41 U.S.C. §§ 2101(2), 2102(a). Simply put, according to these provisions, a procurement official may not disclose one bidder's competition-sensitive proposal features, as enumerated in section 2101(2), to a competing bidder in an ongoing procurement. See, e.g., FAR 3.104-3 (stating that a contracting officer "must not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates"); Lion Vallen, Inc., B-418503 et al., 2020 WL 3542208 (Comp. Gen. May 29, 2020) ("The disclosure of proprietary or source selection information to an unauthorized person during the course of a procurement is improper."). Defendant nonetheless suggests that SAGAM's proposal information, disclosed by the CO to Torres, does not meet the definition of "proposal information" protected by the PIA. The court disagrees.

The information in SAGAM's proposal that was passed by the CO to Torres related to the exigencies of complying with local labor laws and labor agreements in Senegal and set forth SAGAM's understanding of those local conditions. This understanding was essential to SAGAM's plan for the compensation and benefits that would be provided to its guard force. To imply, as defendant does here, that SAGAM's compilation of pertinent local information had no protection under the PIA because the laws and agreements cited by SAGAM were publicly available is unsupportable.

Defendant acknowledges that the disclosed information regarding local conditions was lifted directly from "footnotes to [a] detailed chart" in SAGAM's proposal. Def.'s Cross-Mot. 26-27 (comparing pages 1467-70 and 2018-19 of the administrative record). The chart included citations to provisions of laws and labor agreements to explain specific cost categories in SAGAM's proposal, so as to provide State with the rationale for the costs of contract performance proposed by SAGAM. See id. at 26 (characterizing the information taken from SAGAM's proposal as "cost categories based upon Senegalese statutes and public labor agreements"). The information conveyed by the CO to Torres was not simply a general reference to publicly available laws and labor agreements–each of SAGAM's citations to these laws and agreements was linked to specific aspects of contract performance and contract costs. [6]

The information disclosed to Torres by the CO is encompassed within the definition of "Cost or pricing data" that is prohibited from disclosure under the PIA. [7] 41 U.S.C. § 2101(2)(A); see also id. § 3501(a)(1) ("The term 'cost or pricing data' means all facts that, as of the date of agreement on the price of a contract ..., a prudent buyer or seller would reasonably expect to affect price negotiations significantly."). Because the information ***664** passed by the CO to Torres was cost data protected by the PIA, id. § 2101(2)(A), the court need not decide whether this information might also be protected as "proprietary information" under the PIA, id. § 2101(2)(C). The CO in this procurement clearly violated the PIA through her improper disclosure of SAGAM's proposal information to Torres.

Furthermore, it is not just the PIA that was violated by the CO. SAGAM points to three fundamental fairness provisions of the FAR that also safeguard the integrity of federal procurement activities–FAR 1.102-2, FAR 1.602-2, and FAR 3.101-1. [8] FAR 1.102-2(c)(3) states that "[a]ll contractors and prospective contractors shall be treated fairly and impartially but need not be treated the same." FAR 1.602-2(b) states that contracting officers shall "[e]nsure that contractors receive impartial, fair, and equitable treatment." FAR 3.101-1 states that "[g]overnment business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none." Pursuant to any and all of these measures, a CO may not disclose the cost data of one offeror to the offeror's sole competitor in a procurement so that the competitor may appropriate the information. Cf. MORI Assocs., Inc. v. United States, 102 Fed. Cl. 503, 511-13, 523-25 (2011) (noting that the fairness provisions of the FAR are implicated where there is evidence that an agency official violated the PIA to favor a particular offeror); Comput. Tech. Assocs., Inc., B-288622, 2001 CPD ¶ 187 (Comp. Gen. Nov. 7, 2001) (noting, in the context of a PIA violation, that FAR 1.602-2 authorizes a contracting officer to "protect the integrity of the procurement system by disqualifying an offeror from the competition"); Litton Sys., Inc., 68 Comp. Gen. 422, 425 (May 12,

1989) (recommending that "the integrity of the [procurement] system would be best served by a termination of the [awardee's] contract" because of evidence that an agency official had passed to the awardee nonpublic information regarding technology developed by its only competitor). The court finds that the CO also violated FAR 1.102-2, FAR 1.602-2, and FAR 3.101-1, not just the PIA, when she disclosed SAGAM's proposal information to Torres.

The court next reviews the agency's proposed corrective action of cancelling the tainted solicitation and issuing a new solicitation.

2. Torres Must Be Disqualified to Rationally Address the CO's Improper Disclosure

State acknowledged in late 2020 that the PIA had been violated and that the procurement had been impacted. According to defendant, at that point the agency had discretion to cancel the solicitation and SAGAM's protest is "mere disagreement with the scope of the agency's corrective action." Def.'s Cross-Mot. 32. The fundamental flaw with defendant's position is that cancellation does nothing to remedy the improper disclosure to Torres–cancellation of the solicitation followed by the issuance of a new solicitation, as is contemplated here, merely perpetuates the agency's procurement error so that Torres can continue to benefit from the CO's unfairness to SAGAM and her violation of the PIA.

[22] **[23]** The nature of this court's review of challenges to an agency's corrective action was examined in Dell Federal Systems, L.P. v. United States ("Dell Federal"), 906 F.3d 982 (Fed. Cir. 2018). As is relevant here, the " 'court may set aside a procurement action,' such as a corrective action, 'if ... the procurement official's decision lacked a rational basis.' " Id. at 990 (quoting Centech Grp., 554 F.3d at 1037). The Federal Circuit also stated that "corrective action only requires a rational basis for its implementation." Id. at 991. In other words, the rational basis review for agency corrective actions is "highly deferential," id. at 992 (quoting Croman Corp. v. United States, 724 F.3d 1357, 1363 (Fed. Cir. 2013)), and is satisfied if the agency "provided a coherent and reasonable explanation of its exercise of discretion," id. (quoting Banknote, 365 F.3d at 1351). Applying this standard, the court considers the parties' arguments as to the rationality of State's cancellation decision.

***665** As a threshold matter, SAGAM argues that the administrative record of this case does not contain an adequate explanation of the rationale behind State's decision to cancel the solicitation and not to disqualify Torres. See Pl.'s Mem. 27 ("Without any supporting rationale for choosing cancellation as the most appropriate remedy for its PIA violation, the Court is left without any basis against which to judge the rationality of that decision, in light of the other options available to the Agency." (emphasis added) (citing Starry Assocs., Inc. v. United States, 127 Fed. Cl. 539, 550 (2016))). The burden on State to explain its cancellation decision is not as onerous as SAGAM suggests, however.

[24] **[25]** **[26]** Defendant argues that State "has no obligation to explain why it did not take some other corrective action that a protester believes would have been a better corrective action." Def.'s Cross-Mot. 33 (citing Dell Federal, 906 F.3d at 991-93). The Supreme Court of the United States, in defining the arbitrary and capricious standard of review of agency action, stated that a court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974). More specifically, in Dell Federal, the Federal Circuit held that the procuring agency "was not legally required to address every [corrective action] option, but rather to provide a reasonable corrective action and adequately explain its reasoning for doing so." 906 F.3d at 998. Here, then, the burden on State is to provide a record of the rationale for the cancellation decision, so that the court may determine if this record provides "a coherent and reasonable explanation of [State's] exercise of discretion." Banknote, 365 F.3d at 1351.

The administrative record reflects that the HCA received a detailed account of the PIA violation that marred this procurement. It is clear that the CO believed that she could not "mitigate the PIA violation" and also believed that the proper corrective action was to "cancel and re-solicit the requirement." AR 2891. The HCA agreed with her assessment and her proposed course of action. As State reported to the GAO, the HCA determined that "the solicitation should be cancelled and the requirement re-solicited at a later date." Id. at 2407. The record before the court is adequate to decide whether the agency's corrective action survives rational basis review.

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[27] **[28]** As the court undertakes its review of the record it is important to note that the facts here are unusual–the CO and State acknowledged that a PIA violation occurred but failed to take steps which would restore fairness to this procurement. The court understands that most contracting officers safeguard the proposal information sent to them by offerors and work diligently to prevent, rather than to initiate, inappropriate disclosures of this information. In addition, the court recognizes that most procuring agencies take steps to remedy a PIA violation, once the facts of the violation come to light, instead of ignoring the harm the PIA violation caused. Given that the agency in this procurement is so out of step with the norm, analogous bid protests are few. Before turning to precedent, the court considers the parties' perspectives on the effect that cancellation and resolicitation would have on SAGAM, Torres, and the agency, and whether in light of those effects the cancellation decision was rational.

Defendant musters very little logical support for State's decision to cancel the solicitation, other than to note that the FAR authorizes that type of corrective action, among others, after a PIA violation has occurred. See Def.'s Cross-Mot. 28 ("One remedy available to the HCA is to cancel the procurement." (citing FAR 3.104-7(d)(1)(i))). Indeed, defendant's cross-motion for judgment on the administrative record is devoid of any substantive argument as to the reasonableness of the corrective action chosen by State. Instead, defendant relies on the CO's PIA violation report to imply that it was not reasonable to allow the award to Torres to stand, see id. at 32 (noting "the uncertainty about the propriety of the award to Torres"), and to imply that it was not reasonable to proceed with the reevaluation of proposals, as State had planned for its first corrective ***666** action, because the PIA violation had an impact on the competition, id. at 27 ("In this case, the contracting officer's determination that a potential [PIA] violation did have an impact upon the procurement was not arbitrary." (citing AR 2385-86)). Defendant's reliance on the CO's report does not address whether the cancellation decision, under these circumstances, was a "reasonable corrective action," as required by Dell Federal, 906 F.3d at 998, and does not address the effect of the cancellation on the fairness of any competition under a new solicitation.

The only fairness concern raised in defendant's motion is that of the fairness of the disqualification of Torres proposed by SAGAM. This passage is indicative of defendant's concern:

> The [CO's] report did not suggest that Torres did anything wrong, or even that Torres knew that the discussion letter contained SAGAM['s] proposal information. The December discussion letter from the contracting officer to Torres did not tell Torres that the checklist of cost categories had been gathered from the SAGAM proposal.

Def.'s Cross-Mot. 32 (citing AR 2018-21, 2385-86). In addition, the fact that Torres benefited from a PIA violation, but did not plot to obtain SAGAM's proposal information, is emphasized in another passage of defendant's motion:

> [T]he information provided to the HCA in this case made clear that Torres had not committed any violation of the PIA, or otherwise behaved improperly. The [CO's] report described a disclosure of proposal information by the contracting officer; Torres played no role is seeking the disclosure. The only action taken by Torres in connection with the disclosure letter was to respond to questions posed by the contracting officer. Responding to the contracting officer's questions was proper behavior.

Id. at 34 (citing AR 2385-86); see also Def.'s Reply 6 (asserting that "Torres had done nothing wrong"). Nowhere, however, does defendant address the fairness of the cancellation from the standpoint of SAGAM, the victim of the CO's PIA violation. In this regard, the CO's disregard of the fundamental fairness principles of the FAR is echoed in defendant's motion.

In its reply brief, in passing, defendant notes SAGAM's argument that SAGAM "will suffer a competitive harm in a subsequent procurement if Torres is allowed to offer a new proposal with labor rates and fringe benefit rates that comply with Seneg[a]lese law." Def.'s Reply 6-7.

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That passing mention of the competitive harm alleged by SAGAM is not given any weight in defendant's legal analysis. Instead, defendant minimizes fairness concerns by asserting that "SAGAM wildly exaggerates the significance of the proposal information disclosed in the previous (now cancelled) procurement." Id. at 14.

Finally, defendant rests on the assertion that "we have demonstrated in our moving brief that the State Department articulated a rational basis for its corrective action." Id. at 11 (citing Def.'s Cross-Mot. 26-33). But, as noted above, beyond the fact that cancellation is permitted by FAR 3.104-7(d)(1)(i), the referenced sections of defendant's motion do not show that the cancellation decision was reasonable–they merely show that the CO proposed cancellation because the PIA violation could not, in her opinion, be mitigated.

It may be that defendant's misapprehension of the persuasiveness of its rational basis contentions is founded on a skewed interpretation of Dell Federal. As part of defendant's critique of SAGAM's interpretation of the standard of review stated in Dell Federal, defendant chides SAGAM for including a requirement that the court go "beyond determining whether there is a rational relationship between a defect in the procurement and the corrective action." Def.'s Reply 9. Although the Federal Circuit in Dell Federal endorsed the agency's corrective action and noted that it was "rationally related" to the procurement's defects, 906 F.3d at 995, this turn of phrase does not fully capture the essence of the Federal Circuit's rational basis review of the procurement at issue.

In Dell Federal, two procurement errors were addressed by the agency's corrective action: "failure to conduct discussions and ***667** spreadsheet ambiguities." Id. The agency's corrective action survived rational basis review because both defects were remedied. First, the Federal Circuit noted that "the only way to conduct discussions as contemplated here is to reopen the procurement process to solicit revised proposals," id., which is exactly what the agency proposed to do with its corrective action, id. at 988. Second, the spreadsheet ambiguities were "material" and could not be corrected through clarifications, so the ambiguities would be addressed in discussions the agency would hold with the offerors. Id. at 995. Thus, because the agency's corrective action was "rationally related" to the defects it addressed, it was reasonable and survived rational basis review. Id.

If defendant were correct that any rational relationship, no matter how tenuous, between a procurement defect and the agency's corrective action suffices, the requirement that the agency initiate a "reasonable corrective action," Dell Federal, 906 F.3d at 998, is cast aside. Under defendant's rational relationship construct, it appears that the CO could cancel the solicitation merely because (a) she committed a PIA violation, and (b) there is a rational relationship in the FAR between PIA violations and solicitation cancellations. But that is not the standard that the Federal Circuit set forth in Dell Federal, as shown by its application of the standard to the facts of that bid protest, and by its invocation of precedent.

[29] The Federal Circuit requires, under the rational basis standard, that an agency's corrective action be "rationally based and not contrary to law." Croman Corp., 724 F.3d at 1367; see also Raytheon Co. v. United States, 809 F.3d 590, 595 (Fed. Cir. 2015) (inquiring whether the grounds for the challenged corrective action were "rationally justified"); Chapman L. Firm Co., 490 F.3d at 938 (affirming "this court's inquiry into the reasonableness of the Government's ... proposed corrective action"). As this precedent was interpreted in Dell Federal, the corrective action must have a rational basis, or, in other words, it must be a "reasonable corrective action." 906 F.3d at 998. This is a very deferential standard, but it is nonetheless more stringent than the carte blanche for State that defendant appears to propose.

In contrast to defendant, SAGAM thoroughly examines the effect of the cancellation and new solicitation, as well as the rationality of State's corrective action. SAGAM asserts that the CO's PIA violation "allowed Torres to correct its defective compensation plan," and cancellation of the solicitation "does nothing to reasonably address the fact that Torres will simply prepare a new bid proposal" using the information taken from SAGAM's proposal that was improperly disclosed to Torres by the CO. Pl.'s Mem. 28, 30. In SAGAM's view, any reasonable corrective action must remove the "taint" of the PIA violation from State's procurement of the contract requirement. Id. at 30 (citing NKF Eng'g, Inc. v. United States, 805 F.2d 372, 376-77 (Fed. Cir. 1986)). Although defendant may quibble with SAGAM's characterization of the

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nature and importance of the improperly disclosed cost and pricing data, the court agrees with SAGAM that the integrity of this procurement was tainted, and that any reasonable corrective action was required to address, in some substantive way, the fact that Torres now possesses competition-sensitive information that it has no right to possess. See id. at 2-3 ("[T]he only effective way to remove the taint ... is to disqualify Torres and proceed to award under the current Solicitation or to disqualify Torres from participating in the planned resolicitation ....").

As for the parties' dispute over the proper standard of review, SAGAM correctly notes that it is arbitrary and capricious for an agency to have "entirely failed to consider an important aspect of the problem," Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43, 103 S.Ct. 2856; the important aspects of the problem in this case are that State tainted the integrity of this procurement and that Torres possesses information that gives it an unfair advantage. This is not a protest foreclosed by Dell Federal, as defendant insists, in which a protestor challenges a corrective action for not being the most advantageous choice of a remedy for a procurement defect. Here, SAGAM rightly attacks the cancellation decision as ignoring the most significant aspect of the ***668** CO's PIA violation–that Torres now possesses improperly disclosed information that it can use again, unfairly, to obtain the contract award. The court therefore agrees with SAGAM that the cancellation decision lacks a rational basis, as does State's plan to resolicit the requirement. [9]

[30] **[31]** **[32]** Other bid protest decisions supply guidance in this case, starting with binding precedent that provides an overview of the tools that might be used to ensure procurement integrity. It is clear that a contracting officer has broad authority to protect the integrity of the procurement process, including the authority to disqualify an offeror based on an impropriety or an appearance of impropriety in the procurement. NKF Eng'g, 805 F.2d at 377 & n.7. This authority to disqualify offerors is explicitly authorized, in the context of PIA violations, by FAR 3.104-7(d)(1)(ii). The contracting officer's power to disqualify offerors so as to cure an appearance of impropriety must yield, however, to statutory mandates requiring the public release of information held by government agencies. R & W Flammann GmbH v. United States, 339 F.3d 1320, 1324 (Fed. Cir. 2003). Finally, in the procurement integrity context, a contracting officer may not disqualify an offeror in the absence of facts showing that an impropriety or an appearance of impropriety occurred. See NKF Eng'g, 805 F.2d at 376 (interpreting the holding of CACI, Inc.-Fed. v. United States, 719 F.2d 1567 (Fed. Cir. 1983)).

The parties unearthed a body of nonbinding precedent that touches upon the issue of the reasonableness of corrective actions that address procurement improprieties. These decisions are largely unhelpful due to the unusual facts of this case. It is ironic that defendant chides SAGAM for failing to find analogous cases, when it was the CO's behavior in this procurement that stepped so far out of the normal course of a procuring agency's communications with offerors. See Def.'s Cross-Mot. 34 ("In its brief, SAGAM cites no case holding that an offeror should be disqualified based upon a PIA violation, or other misconduct, committed by someone else."), 36 (asserting that SAGAM's proposal that State disqualify Torres is made "without citing any legal authority"); Def.'s Reply 12 ("SAGAM fails to cite a single decision where an offeror was disqualified merely because that offeror possessed proposal information from a prior procurement."). Notwithstanding the paucity of bid protests that resemble this one, persuasive authority and common sense compel the conclusion that State's cancellation decision was not a rationally related response to the procurement defect that left Torres in possession of SAGAM's competition-sensitive information.

The court begins with Lion Vallen, Inc., a recent decision issued by the GAO. 2020 WL 3542208. According to the agency's contracting officer, an inadvertent disclosure of one offeror's "price and other source selection information" to another offeror, during discussions, "incurably affect[ed] the source selection process," so the contracting officer "recommended cancelling the procurement." Id. at *3. After the cancellation, the agency issued a new solicitation. Id. at *4. The offeror that had been notified of the disclosure of its proposal information protested the agency's new solicitation, arguing, in relevant part, that "the agency improperly disclosed the protester's proprietary information on three occasions and failed to adequately mitigate the competitive disadvantage from the disclosures." Id. at *5.

The GAO found that there was no competitive disadvantage flowing from the disclosure of the protestor's technical information, and that the agency had sufficiently mitigated

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the impact on the procurement of the disclosure of protestor's price information. As to the first type of disclosure, the protestor failed to show how the technical information, which identified flaws in the protestor's proposed approach to contract performance, would provide a competitive advantage to its rivals in the new competition. For the second type of information, the disclosure of the protestor's overall price for the cancelled solicitation was benign due to substantive changes ***669** in the contract requirements and labor categories set forth in the new solicitation.

Although the agency's corrective action, including the issuance of a new solicitation, was deemed to be reasonable in Lion Vallen, Inc., the facts here are distinguishable. SAGAM has shown that it has and will continue to suffer a competitive disadvantage because Torres now benefits from improperly disclosed proposal information. Cancellation and resolicitation do not reasonably address the CO's inequitable conduct here.

An instructive example of the disqualification of an offeror is found in Computer Technology Associates, a 2001 decision by the GAO. 2001 CPD ¶ 187. Employees of the protestor improperly obtained and studied information presented orally by other offerors to agency staff, and the protestor was disqualified from the competition. The GAO upheld the disqualification, noting that the protestor "obtain[ed] and possess[ed] the information, and ... was in control of whether it was used, [which] calls into question the integrity of the immediate and future source selections." Id. The primary similarity between Computer Technology Associates and this case is that Torres continues to possess the improperly disclosed information taken from SAGAM's proposal, which affects the integrity of the current competition as well as a future competition. The primary difference, and it is a significant one, between Computer Technology Associates and this case is that Torres did not steal the competition-sensitive information–it was given the information by the CO.[10] But see Compliance Corp. v. United States, 22 Cl. Ct. 193, 201 (1990) ("Even assuming the conduct itself was devoid of improper motives, what remains is the appearance of impropriety, which is a proper basis for disqualification." (citing NKF Eng'g, 805 F.2d at 376-77)), aff'd, 960 F.2d 157 (Fed. Cir. 1992).

A logical corrective action protest to discuss here is the one the GAO flagged as raising issues similar to those in SAGAM's GAO protest of State's cancellation decision, Superlative Technologies, Inc. ("Superlative II"), B-310489.4, 2008 CPD ¶ 123 (Comp. Gen. June 3, 2008). That decision was preceded by an earlier one, Superlative Technologies, Inc. ("Superlative I"), B-310489 et al., 2008 CPD ¶ 12 (Comp. Gen. Jan. 4, 2008), which provides useful context. As described in Superlative I, Superlative Technologies, Inc. ("SuperTec") was one of three offerors in a negotiated procurement. An agency representative reported to the contracting hierarchy that she had compromised the integrity of the procurement by sharing confidential source-selection information with two of the offerors, but not with SuperTec. Superlative I, 2008 CPD ¶ 12. The contracting officer cancelled the "tainted procurement." Id.

Unfortunately, the new solicitation, through various improper machinations, resulted in a sole-source contract award to a team including one of the offerors that had received the improperly disclosed information, and the proposal that the team submitted for the sole-source award was substantially the same as the earlier one submitted by the offeror with an "unfair advantage" in the first competition. Id. In other words, SuperTec lost its opportunity to fairly compete for the contract because the cancellation decision perpetuated the tainted procurement through a new solicitation that remained fundamentally unfair. The GAO advised the agency to "rescind the cancellation notice" and "determin[e] what information was disclosed and to whom, [and whether one of the recipients of the improper disclosure] or any other offeror should be disqualified from the competition, and/or whether a level playing field can be established by disclosing the information [that was not disclosed to SuperTec] to all offerors." Id. Finally, the GAO recommended that "[f]ollowing that consideration, the agency should conduct a competitive procurement for the requirements under the original [request for quotations], if otherwise appropriate." Id.

***670** In Superlative II, 2008 CPD ¶ 123, the GAO assessed, in a new but related protest, whether the agency had followed through on its investigation of the tainted procurement and had reasonably resolved the procurement integrity violation. It had not. Indeed, there was no substantive investigation or consideration of procurement integrity; only when the GAO insisted on further investigation was the importance and extent of the improper communications revealed. Id. When the GAO warned the agency that SuperTec's new protest would also be sustained, in all likelihood, the agency refused to take action: "Notwithstanding our specific advice, the

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agency ha[d] not indicated that it intends to take any further action with regard to these issues." Id.

After a lengthy analysis of a procuring agency's responsibilities under the fairness provisions of the FAR, the GAO stated that the agency's conduct "precludes a conclusion that the cancellation, followed by the subsequent sole-source award under which [the recipient of the improper information] is performing a substantial portion of the services sought under the canceled solicitation, was reasonable and appropriate." Id. The GAO commented that the agency "fail[ed] to meaningfully address the FAR requirements regarding identification and resolution of procurement integrity and/or [organizational conflict of interest] issues. On this record, the agency's actions are not reasonable, nor are they consistent with the FAR requirements." Id. SuperTec's second protest was sustained, and the GAO again recommended that the agency investigate the procurement integrity violations and determine whether, among other options, disqualification of an offeror, or offerors, was appropriate.

Although the court agrees with defendant that Superlative II is distinguishable from this case on its facts, the operative issues are not dissimilar because in that procurement the agency, after giving an unfair advantage to two of three offerors, perpetuated the unfairness through cancellation of a solicitation and resolicitation. The agency turned a blind eye to the fairness principles that require that all offerors be treated equitably. Here, too, State takes an ostrich-like stance and refuses to reasonably address the taint caused by the CO's disclosures to Torres and the failure of cancellation and resolicitation to mitigate the CO's improper disclosures.

[33] **[34]** Disqualification is a tool that can level the competitive playing field. See, e.g., Guardian Techs. Int'l, B-270213 et al., 96-1 CPD ¶ 104 (Comp. Gen. Feb. 20, 1996) ("A contracting officer may protect the integrity of the procurement system by disqualifying an offeror from the competition where the firm may have obtained an unfair competitive advantage, even if no actual impropriety can be shown, so long as the determination is based on facts and not mere innuendo or suspicion."). And, although disqualification may seem like a severe sanction, at times it is the only remedy that can reasonably address a PIA violation. See id. (stating that because "the evidence is sufficient to establish a strong likelihood that [an offeror] gained an unfair competitive advantage in this procurement," the agency should "disqualify [the offeror with the unfair advantage] from the competition" (citing NKF Eng'g, 805 F.2d at 372)). Here, too, the only reasonable corrective action is to disqualify Torres from the current competition.

3. SAGAM Has Established Prejudice

[35] Although SAGAM has established that State's cancellation and resolicitation decision lacked a rational basis, SAGAM cannot prevail unless it demonstrates that it was prejudiced by that corrective action.[11] Specifically, the burden on SAGAM is to show that absent the agency's decision, SAGAM had a substantial chance of receiving the contract award. Banknote, 365 F.3d at 1351; Data Gen., 78 F.3d at 1562. If, rather than cancelling the solicitation, the agency had crafted a rational corrective action and disqualified Torres from the competition under the tainted solicitation, SAGAM had a substantial chance of receiving the contract award because it was the only bidder, other than ***671** Torres, in the competitive range. SAGAM was prejudiced by the corrective action instituted by State that lacked a rational basis.

4. Injunctive Relief Is Merited

[36] **[37]** Because SAGAM has established the existence of a significant, prejudicial procurement error, the court must address whether SAGAM is entitled to injunctive relief. The United States Court of Federal Claims has the authority to award injunctive relief pursuant to 28 U.S.C. § 1491(b)(2), and is guided in making such an award by Rule 65 of the Rules of the United States Court of Federal Claims ("RCFC"). In determining whether to issue a permanent injunction, the court must consider whether (1) the plaintiff has succeeded on the merits; (2) the plaintiff will suffer irreparable harm if the court withholds injunctive relief; (3) the balance of hardships favors the grant of injunctive relief; and (4) it is in the public interest to grant injunctive relief. PGBA, LLC v. United States, 389 F.3d 1219, 1228-29 (Fed. Cir. 2004).

[38] **[39]** **[40]** **[41]** **[42]** The protestor bears the burden of establishing the factors by a preponderance of the evidence. Lab. Corp. of Am. Holdings v. United States, 116 Fed. Cl. 643, 654 (2014). None of the four factors, taken individually, is dispositive, and a "weakness of the showing regarding one factor may be overborne by the strength of the others."

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FMC Corp. v. United States, 3 F.3d 424, 427 (Fed. Cir. 1993). [12] Conversely, "the absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned the other factors, to justify the denial" of injunctive relief. Id. The award of injunctive relief is within the discretion of the court. See Turner Constr. Co. v. United States, 645 F.3d 1377, 1388 (Fed. Cir. 2011) ("We give deference to the Court of Federal Claims' decision to grant or deny injunctive relief, only disturbing its decision if it abused its discretion.").

SAGAM has succeeded on the merits of its protest. Therefore, the court considers the three remaining injunctive relief factors.

a. Irreparable Injury

[43] **[44]** With respect to the irreparable injury factor, "[t]he relevant inquiry ... is whether [the] plaintiff has an adequate remedy in the absence of an injunction." Magellan Corp. v. United States, 27 Fed. Cl. 446, 447 (1993); see also Younger v. Harris, 401 U.S. 37, 43-44, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (noting that "the basic doctrine of equity jurisprudence [is] that courts of equity should not act ... when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief"). SAGAM contends that it will be harmed absent a permanent injunction because it will lose the ability to fairly compete for the contract, either through the tainted solicitation or a new solicitation. SAGAM also states that resolicitation "would not only deprive SAGAM of a contract opportunity to continue providing local guard services as it has done successfully for more than 35 years, but also penalize SAGAM for the Agency's PIA violation." Pl.'s Reply 20.

Defendant argues that monetary losses flowing from the inability to secure a contract and being subjected to unfair competitive bidding processes are not enough to show irreparable harm. Further, in defendant's view, because the record does not show that SAGAM's proprietary information was disclosed to Torres, SAGAM has not suffered irreparable harm. While any of these propositions might be debatable when viewed in isolation and in hypothetical circumstances, here there is no doubt that SAGAM has suffered irreparable harm due to the CO's improper disclosure of SAGAM's proposal information to its sole rival in the competitive range for this competition, and its likely rival in any subsequent competition. [13]

***672** **[45]** This court has recognized that a lost opportunity to compete for a contract–and the attendant inability to obtain the profits expected from the contract–can constitute irreparable injury. See, e.g., Serco Inc. v. United States, 81 Fed. Cl. 463, 501-02 (2008) (observing that when "the only other available relief–the potential for recovery of bid preparation costs–would not compensate [the protestors] for the loss of valuable business," such a "loss, deriving from a lost opportunity to compete on a level playing field for a contract, has been found sufficient to prove irreparable harm"). As the long-term incumbent contractor, SAGAM submitted a proposal with the expectation of making a profit. The lost opportunity to fairly compete for this contract and earn profits, as evidenced by the declaration attached to SAGAM's supplemental brief, constitutes irreparable harm in this instance. [14]

Defendant contends, nonetheless, that because the terms of State's new solicitation are not yet known, SAGAM's allegations of irreparable harm are too speculative. To support this argument, defendant explores hypothetical scenarios: (1) "[I]t is possible that the new solicitation will identify all statutory labor benefit provisions in Senegal, or require all offerors to do so in their proposals, [so as to] put all offerors on an equal footing in a clear manner." (2) "[T]he new solicitation may contain objectionable terms, and SAGAM may protest the solicitation." Def.'s Suppl. Br. 5 n.2. The court does not find that these abstract scenarios diminish the irreparable harm flowing to SAGAM from the cancellation and resolicitation of the contract requirement. The agency's PIA violation, unmitigated by a rational corrective action, deprived SAGAM of a fair competition and the potential for profits from winning the contract, and will continue to affect SAGAM's ability to fairly compete for a new contract. Consequently, SAGAM has established irreparable injury.

b. Balance of Hardships

[46] **[47]** In addition to considering whether a protestor would suffer an irreparable injury absent a permanent injunction, "the court must weigh the irreparable harm [the] plaintiff would suffer without an injunction against the harm an injunction would inflict on defendant." Progressive Indus., Inc. v. United States, 129 Fed. Cl. 457, 485 (2016). SAGAM

contends that State will not be harmed because "SAGAM is the longtime incumbent and capable of continuing to perform under a new contract award, saving the Government from any time/cost associated with a recompete," Pl.'s Mem. 38, and notes that State has already deemed "SAGAM's proposal [to be] 'Acceptable,' " Pl.'s Reply 20. Defendant asserts in its cross-motion for judgment on the administrative record that enjoining the cancellation of the solicitation and resolicitation of the contract requirement would "deny the United States the benefits of competition." Def.'s Cross-Mot. 40.

SAGAM argues that the balance of hardships tips in its favor. The court agrees. As shown by the parties' arguments in their supplemental briefs, which are supported by declarations, the harm to SAGAM flowing from the absence of an injunction greatly outweighs the inconvenience that State would experience from an injunction that was necessitated by the CO's unmitigated PIA violation. Indeed, to deny the injunction would reward the CO for her violation.

SAGAM highlights three specific consequences of the PIA violation, which was followed by cancellation and a proposed resolicitation of the requirement by State: (1) Torres now possesses SAGAM's understanding of compensation requirements for guards in Senegal; (2) SAGAM lost the opportunity to fairly compete for up to five years of contract performance; and (3) SAGAM lost the opportunity to earn profits on that contract performance. According to SAGAM, absent injunctive relief, such as the disqualification of Torres, these harms are ongoing. Further, ***673** contends SAGAM, bid preparation and proposal costs would not make up for its losses, because only injunctive relief provides an adequate remedy.

Defendant recites a litany of hardships that the agency would face if this court issues an injunction. In the agency's view, the following conditions, among others, should be considered by the court: (1) resolicitation is urgently needed, given the passage of time, because the conditions in Senegal are not the same as those underlying the tainted solicitation; (2) the disqualification of Torres would be expensive for State, as SAGAM could "name its price," Def.'s Suppl. Br. 10; and (3) injunctive relief could lead to more protests, including one by Torres, potentially requiring that the agency resort to expensive sole-source contract solutions in 2022. The court is mindful, too, that the safety of embassy personnel is of grave concern, and that national security, in general, is given "due regard" in this court's bid protest jurisdiction. See 28 U.S.C. § 1491(b)(3).

It is important to note, first, that State is responsible for the hardships it now faces, through its violation of the PIA and its failure to undertake a rational corrective action to redress that violation. The court cannot ignore the fact that State's hardships are largely self-inflicted whereas SAGAM's hardships are the product of the agency's failure to conduct a fair procurement, or to ensure that a new procurement would be fair. See, e.g., Anham FZCO v. United States, 144 Fed. Cl. 697, 724 (2019) ("The irreparable harm plaintiff would suffer absent an injunction weighs heavily against defendant's hardships that are, to some degree, of its own making."). When the remarkable circumstances of this procurement are considered as a whole, additional procurement delays and costs pose less of a hardship to State than the hardship that would be suffered by SAGAM.

c. Public Interest

[48] **[49]** **[50]** Finally, when "employing the extraordinary remedy of injunction," a court "should pay particular regard for the public consequences" of doing so. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). There is no dispute that "[t]here is an overriding public interest in preserving the integrity of the procurement process by requiring the Government to follow its procurement regulations." Bona Fide Conglomerate, Inc. v. United States, 96 Fed. Cl. 233, 242 (2010). Although "there is a countervailing public interest in minimizing disruption" to the procuring agency, Heritage of Am., LLC v. United States, 77 Fed. Cl. 66, 80 (2007), defendant has not persuaded the court that State's activities in Senegal would be disrupted by rectifying the CO's PIA violation. Rather, the United States might pay a premium for contract services provided by SAGAM, as contrasted with services provided by Torres, which is a reasonable price to pay to fulfill the agency's obligation to treat potential contractors fairly. While State's avowed interest in "truly full and open competition" is generally a high priority in procurement law, Def.'s Suppl. Br. 10, under the circumstances of this procurement the agency's interests in the benefits of price competition must yield to its duty to treat prospective contractors fairly, FAR 1.102-2(c)(3). Accordingly, the court finds that the public interest weighs in SAGAM's favor.

5. The Court Tailors Injunctive Relief to Minimize Harm

[51] In addition to prevailing on the merits of its protest, SAGAM has established that it will suffer irreparable harm if the court withholds injunctive relief, that the balance of hardships tips in its favor, and that an award of injunctive relief is in the public interest. Thus, the issuance of a permanent injunction is warranted. In issuing a permanent injunction, this court tailors that relief so that any harm to the government, private parties, and the public interest is minimized. E.g., Heritage of Am., LLC, 77 Fed. Cl. at 79. Having considered the parties' recommendations as to the terms of a permanent injunction (all of which are unacceptable to the agency), the court imposes an injunction that will safeguard fundamental fairness principles.

At the outset, the court rejects defendant's favored choice among the actions proposed by the parties: there is no need to remand ***674** the agency's cancellation and resolicitation plan to the HCA to obtain a second opinion as to whether the plan is rational and whether the agency should reconsider its decision not to disqualify Torres. It is now time to fix the mess that State has made of this procurement, without further delay.

The only effective solution here is to restore this competition to its status before cancellation by enjoining the cancellation of the solicitation, enjoining any resolicitation of the requirement, disqualifying Torres as the beneficiary of improperly disclosed information taken from SAGAM's proposal, and having the agency proceed to award the contract to the only remaining offeror in the competitive range (i.e., SAGAM), if that offeror is found to be a responsible offeror. Cf. Parcel 49C Ltd. P'ship v. United States, 31 F.3d 1147, 1154 (Fed. Cir. 1994) (holding that, in the context of an improper cancellation, the proper "injunctive remedy merely restores the status quo ante the illegal cancellation"). This solution is the only one that cures the PIA violation and does not penalize SAGAM for the improper behavior of the CO.

[52] Defendant argues, nonetheless, that the court does not have the power to compel the award of a contract to a particular offeror. It is true that the "[s]election of a contractor among the [offerors] and award of the contract are improper exercises of the court's authority." CCL Serv. Corp. v. United States, 43 Fed. Cl. 680, 688 (1999); see also Scanwell Lab'ys, Inc. v. Shaffer, 424 F.2d 859, 869 (D.C. Cir. 1970) ("It is indisputable that the ultimate grant of a contract must be left to the discretion of a government agency; the courts will not make contracts for the parties."). But here the court did not make a competitive range of one–that circumstance is the product of the agency's evaluation of SAGAM's and Torres's proposals and the contamination of this procurement by the CO. The injunction in this matter bars the agency's cancellation of the solicitation and resolicitation, as both of these actions are arbitrary, capricious, and violate fairness standards, and requires the government to "eliminate the ... taint of the prior proceedings." CACI, Inc.-Fed., 719 F.2d at 1575. The court does not thereby make a contract between State and SAGAM, it instead requires State to implement its only remaining lawful option in this procurement. See Great Lakes Dredge & Dock Co. v. United States, 60 Fed. Cl. 350, 371 (2004) (enjoining the agency in that protest "from proceeding with performance of the contract with any entity other than [the protestor] provided that the Corps finds [the protestor] to be a responsible contractor").

This court has enjoined the improper cancellation of a solicitation on other occasions. E.g., Tolliver Grp., Inc. v. United States, 151 Fed. Cl. 70, 120 (2020). In rare circumstances, this type of injunction leaves the agency with only one lawful option, award to the protestor. The following passage from Parcel 49C discusses the effect of an injunction that was not very different from the injunction required here:

> In this case, ... the trial court did not order the award of the contract to Parcel 49C. Instead, the trial court properly enjoined the illegal action and returned the contract award process to the status quo ante any illegality. Before the illegal cancellation, [the General Services Administration] had announced the intended award to Parcel 49C. The court's injunction, however, does not order the award of the contract to Parcel 49C. The court's order merely restores the posture of the process before the illegal cancellation. The award process is not complete. The process will commence from where it left off with the contract award flowing from an orderly and lawful proceeding. The Court of Federal

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> Claims' injunction has the effect of returning [the solicitation] to its pre-cancellation posture and removing the illegal taint.

31 F.3d at 1153 (emphasis added). In that protest, "[t]he Government retain[ed] the power to proceed with its award process or to terminate the award process for any legal reason." Id. at 1154 (emphasis added). Here, State has the discretion to terminate the award process if SAGAM is not a responsible offeror, but there are no other lawful reasons that permit State to avoid an award to SAGAM.

***675** Defendant also argues that the disqualification of Torres is beyond the power of the court, relying on Axiom Resource Management, Inc. v. United States, 564 F.3d 1374 (Fed. Cir. 2009). According to defendant, this court would "step into the shoes of the contracting officer" were it to disqualify Torres from the competition. Def.'s Supp. Br. 12 (citing Axiom, 564 F.3d at 1381-82). The referenced passage from Axiom, however, criticizes the trial court for conducting a de novo review of potential organizational conflicts of interests, instead of reviewing the record of the procuring agency's conduct under the arbitrary and capricious standard. Here, State's failure to disqualify Torres after the discovery of the CO's PIA violation was arbitrary, capricious, and fundamentally unfair in contravention of the FAR. In directing the agency to disqualify Torres, the court has adhered to the standard of review in both Axiom and Dell Federal.

Finally, defendant raises concerns that the contract award to SAGAM will pose a number of risks for State and even for SAGAM. Having duly considered these concerns, the court notes that the difference between SAGAM performing extensions of the incumbent contract through March 31, 2022, and performing the base year of a new contract, which includes four option years, through the summer of 2022, does not appear to have much impact on the risks identified in the CO's declaration. The court is not persuaded that the risks identified by the CO, in these circumstances, outweigh the importance of the permanent injunction in favor of SAGAM.

III. CONCLUSION

For the reasons set forth above, the court **GRANTS** defendant's motion to dismiss Count II of the complaint on mootness grounds, **GRANTS** SAGAM's motion for judgment on the administrative record, and **DENIES** defendant's cross-motion for judgment on the administrative record. SAGAM is entitled to injunctive relief. Specifically, the court **DIRECTS** State to restore this competition to its status precancellation, **ENJOINS** State from cancelling Solicitation No. 19AQMM18R0332 and from resoliciting the contract requirement, **DIRECTS** State to disqualify Torres as the beneficiary of improperly disclosed information taken from SAGAM's proposal, and **DIRECTS** State to proceed to award the contract to the remaining offeror in the competitive range if that offeror is determined to be responsible.

Further, the court awards costs to SAGAM pursuant to RCFC 54(d). The clerk shall enter judgment in favor of SAGAM, consistent with this opinion.

The court has filed this ruling under seal. The parties shall confer to determine agreed-to proposed redactions. Then, by **no later than Friday, July 23, 2021**, the parties shall file a joint status report indicating their agreement with the proposed redactions, **attaching a copy of those pages of the court's ruling containing proposed redactions, with all proposed redactions clearly indicated**. [15]

Further, the court reminds the parties of their obligation under paragraph 12 of the protective order filed on March 31, 2021, to file redacted versions of protected documents for the public record. If the parties have not already filed redacted versions of their motions and supporting briefs, they shall file a joint status report **by no later than Friday, July 23, 2021**, explaining the reason for the delay.

IT IS SO ORDERED.

All Citations

154 Fed.Cl. 653

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Footnotes

* The court initially issued this Opinion and Order under seal with instructions for the parties to propose any redactions. The parties informed the court that no redactions were necessary to the Opinion and Order.

1 The statutory provisions commonly known as the Procurement Integrity Act ("PIA") are codified at 41 U.S.C. §§ 2101-2107.

2 SAGAM's allegations in this regard remain relevant to the court's review of the rationality of the agency's decision to cancel the solicitation.

3 Although SAGAM also argues that the agency breached its duty of good faith and fair dealing in this procurement, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") recently held that the arbitrary and capricious standard of review for bid protests encompasses such a claim. See Safeguard Base Operations, LLC v. United States, 989 F.3d 1326, 1332 (Fed. Cir. 2021) ("[W]e ... address a question of first impression—whether the Claims Court has jurisdiction over a claim that the Government breached an implied-in-fact contract to fairly and honestly consider an offeror's proposal in the procurement context."), 1343 ("[W]e adopt the traditional standards of review applicable in other bid protest cases brought under § 1491(b)(1)[, and not the standards of review applicable in cases brought under § 1491(a),] to bid protest[ ] cases which also raise implied-in-fact contract claims in the procurement context."). For this reason the court will not separately address SAGAM's arguments alleging a breach of the agency's duty of good faith and fair dealing.

4 Defendant does not challenge SAGAM's standing to bring this suit. SAGAM is an interested party with standing to bring this protest under either of the preaward standing tests articulated by the Federal Circuit. See Orion Tech., Inc. v. United States, 704 F.3d 1344, 1348-49 (Fed. Cir. 2013) (holding that the standing test varies depending on the type of preaward protest at issue).

5 Her intent in sharing information gleaned from SAGAM's proposal with Torres is not relevant to the instant protest, but the error was egregious.

6 Defendant does not allege that SAGAM's explanatory footnotes linking local labor laws and labor agreements to the cost categories in its proposal had "been previously made available to the public or disclosed publicly," FAR 3.104-1, so as to remove this information from the protection of the PIA.

7 As defendant's counsel noted at oral argument, the parties did not reference cost data, a category of proposal information protected by the PIA, 41 U.S.C. § 2101(2)(A), in their briefs. Although the disclosure of publicly available cost or price information causes no competitive harm, see Liquidity Servs., Inc., B-409718, 2014 CPD ¶ 221 (Comp. Gen. July 23, 2014) (finding no competitive harm where a rival offeror may have had access to the protestor's prices on a prior contract), SAGAM's application of relevant provisions of law and labor agreements to its guard compensation cost categories was competition-sensitive information, cf. Lion Vallen, Inc., 2020 WL 3542208, at *7 (noting that the agency acknowledged that the disclosure of the protestor's overall price to another offeror "affected the competition").

8 These regulations are referenced by SAGAM in its critique of the agency's cancellation decision, not in the context of the CO's improper disclosures to Torres.

9 Torres was invited by State to compete for the contract requirement under the new solicitation. AR 2391.

10 Although this type of PIA violation appears to be rare, the knowing disclosure of proposal information submitted by one offeror to persons not permitted to view such material has been the topic of other protests. See, e.g., Litton Sys., Inc., 68 Comp. Gen. at 422 (sustaining a protest because evidence indicated "that, at a critical period in the competition, source selection sensitive information concerning Litton's product was improperly disclosed by the Air Force to" Litton's sole competitor).

11 Defendant did not address the issue of prejudice in either its cross-motion for judgment on the administrative record or its reply brief.

12 Although FMC Corp. concerns the award of a preliminary injunction, 3 F.3d at 427, "[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success," Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n.12, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

13 Defendant's reliance on Citizant, Inc. v. United States, 154 Fed.Cl. 8 (Fed. Cl. June 9, 2021), is inapt. In that opinion, there was no weighing of the irreparable harm factor to determine whether a permanent injunction should issue.

14 The court ordered supplemental briefing because the parties' discussion of the irreparable harm and balance of hardships factors was not robust, and their positions on the feasibility of various specific proposals for injunctive relief were unclear. The supplemental briefing caused no delay.

15 The parties' status report shall also identify proposed redactions, if any are required, to the court's order of June 11, 2021, which was filed under seal.

End of Document

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Square One Armoring Service, Inc. v. United States, Fed.Cl., September 28, 2015

100 Fed.Cl. 687
United States Court of Federal Claims.

SYSTEMS APPLICATION & TECHNOLOGIES, INC., Plaintiff,
v.
The UNITED STATES, Defendant,
and
Madison Research Corporation, Defendant–Intervenor.

No. 11–280C.
|
Filed Under Seal: Aug. 9, 2011.
|
Reissued for Publication: Aug. 25, 2011. *

Synopsis

Background: Awardee of contract by Army Aviation and Missile Life Cycle Management Command Contracting Center, to provide aerial target flight operations and maintenance services, filed bid protest challenging Army's proposed corrective action to terminate contract, amend solicitation, accept revised proposals, and make new source selection decision, in response to prior bid protest by parent of incumbent contractor. Awardee moved for judgment on administrative record, and government and parent moved to dismiss for lack of subject matter jurisdiction and cross-moved for judgment on administrative record.

Holdings: The Court of Federal Claims, Sweeney, J., held that:

[1] bid protest was reviewable under Tucker Act;

[2] awardee had standing;

[3] bid protest was ripe;

[4] in matter of first impression, underlying informal suggestion that procuring agency take corrective action is reviewable for rationality;

[5] Army's reliance on e-mail message to take corrective action was unreasonable;

[6] Army's decision to take corrective action was unreasonable;

[7] Army's decision to take corrective action was unlawful;

[8] awardee was prejudiced by Army's decision to take corrective action; and

[9] permanent injunctive relief was warranted.

Plaintiff's motion granted.

Procedural Posture(s): Motion to Dismiss.

West Headnotes (69)

[1] United States Construction and presumptions as to pleadings

In ruling on a motion to dismiss, Court of Federal Claims generally assumes that the allegations in the complaint are true and construes those allegations in the plaintiff's favor.

[2] United States As to jurisdiction

If a defendant challenges the factual basis of jurisdiction of the Court of Federal Claims, contested allegations in the complaint are not controlling; rather, plaintiff must come forward with a preponderance of evidence in support of its jurisdictional allegations.

[3] United States As to jurisdiction

Court of Federal Claims may look to evidence outside of the pleadings to determine the existence of subject matter jurisdiction.

[4] United States In general; establishment and jurisdiction

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Whether the Court of Federal Claims has jurisdiction to decide the merits of a case is a threshold matter.

[5] **United States** In general; establishment and jurisdiction

Without jurisdiction the Court of Federal Claims cannot proceed at all in any cause.

1 Cases that cite this headnote

[6] **United States** In general; establishment and jurisdiction

"Jurisdiction" is power to declare the law, and when it ceases to exist, the only function remaining to the Court of Federal Claims is that of announcing the fact and dismissing the cause.

[7] **United States** In general; establishment and jurisdiction

The parties or the Court of Federal Claims sua sponte may challenge the court's subject matter jurisdiction at any time.

[8] **United States** Claims against United States in general

The ability of the Court of Federal Claims to hear and decide suits against the United States is limited.

[9] **United States** Necessity of waiver or consent

United States Mode and sufficiency of waiver or consent

United States, as sovereign, is immune from suit save as it consents to be sued; the government's waiver of immunity cannot be implied but must be unequivocally expressed.

[10] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Tucker Act, the principal statute governing the jurisdiction of the Court of Federal Claims, waives sovereign immunity for claims against the United States in bid protests. 28 U.S.C.A. § 1491(b).

1 Cases that cite this headnote

[11] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Contract awardee's bid protest challenging Army's proposed corrective action to terminate and resolicit contract to provide aerial target flight operations and maintenance services was reviewable, under Tucker Act provision authorizing bid protest jurisdiction to render judgment on action by interested party objecting to solicitation by federal agency for bids or proposals for proposed contract, since proposed corrective action was part of Army's procurement process, and awardee was not merely challenging Army's plan to terminate contract, but rather, challenged entire scope of Army's decision to take corrective action. 28 U.S.C.A. § 1491(b)(1).

8 Cases that cite this headnote

[12] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

The bid protest jurisdiction of the Court of Federal Claims, under the Tucker Act, should be broadly construed. 28 U.S.C.A. § 1491(b)(1).

2 Cases that cite this headnote

[13] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

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Under the Tucker Act, Court of Federal Claims has bid protest jurisdiction to entertain objections to a solicitation, objections to a proposed award, objections to an award, objections related to a statutory or regulatory violation in connection with a procurement, and objections related to a statutory or regulatory violation in connection with a proposed procurement. 28 U.S.C.A. § 1491(b)(1).

1 Cases that cite this headnote

[14] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

The jurisdictional grant in Tucker Act applies to the entire procurement process. 28 U.S.C.A. § 1491(b)(1).

2 Cases that cite this headnote

[15] **Federal Courts** Justiciability in general

United States In general; establishment and jurisdiction

Jurisdictional and justiciability inquiries of the Court of Federal Claims are distinct.

[16] **Federal Courts** Justiciability in general

An issue is "justiciable" if it is within the competency of the Court of Federal Claims to supply relief.

[17] **Federal Courts** Justiciability in general

Court may find that it possesses jurisdiction over the subject matter of a case but that the dispute is nonjusticiable.

[18] **United States** Standing

The question of standing is whether the litigant is entitled to have the Court of Federal Claims decide the merits of the dispute or of particular issues.

[19] **United States** Standing

The standing inquiry in the Court of Federal Claims involves both Article III case or controversy limitations on federal jurisdiction and prudential limitations on its exercise. U.S.C.A. Const. Art. 3, § 2, cl. 1.

1 Cases that cite this headnote

[20] **Federal Courts** Case or Controversy Requirement

Although federal courts established under Article I are not bound by the case or controversy requirement of Article III, the Court of Federal Claims and other Article I courts generally apply the case or controversy justiciability doctrines in their cases for prudential reasons. U.S.C.A. Const. Art. 1, § 1; U.S.C.A. Const. Art. 3, § 2, cl. 1.

1 Cases that cite this headnote

[21] **Public Contracts** Parties; standing

United States Parties; standing

The bid protester bears the burden of establishing its standing to protest in the Court of Federal Claims.

[22] **Public Contracts** Parties; standing

United States Parties; standing

Tucker Act imposes more stringent standing requirements on bid protesters than Article III. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1491(b)(1).

[23] **Public Contracts** Parties; standing

United States Parties; standing

Under the Tucker Act, bid protests may only be brought by interested parties. 28 U.S.C.A. § 1491(b)(1).

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[24] **Public Contracts** Parties; standing

United States Parties; standing

Under the Tucker Act, standing of an interested party is limited to actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract. 28 U.S.C.A. § 1491(b)(1).

1 Cases that cite this headnote

[25] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

A bid protester must demonstrate prejudice to succeed on the merits of its bid protest.

4 Cases that cite this headnote

[26] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

Public Contracts Parties; standing

United States Rights and Remedies of Disappointed Bidders; Bid Protests

United States Parties; standing

The test for demonstrating prejudice to a bid protester at both the standing and merits stages of the protest is the same, but application of the test may yield different results due to the differing standards of review.

5 Cases that cite this headnote

[27] **Public Contracts** Parties; standing

United States Parties; standing

For standing to assert bid protest as an interested party, under the Tucker Act, a bid protester must establish that it (1) is an actual or prospective bidder, and (2) possesses the requisite direct economic interest. 28 U.S.C.A. § 1491(b)(1).

1 Cases that cite this headnote

[28] **Public Contracts** Parties; standing

United States Parties; standing

There are two tests for demonstrating a direct economic interest required for a bid protester's standing: (1) in the preaward context, a protester must show a non-trivial competitive injury which can be addressed by judicial relief, and (2) in the postaward context, a protester must show that it had a substantial chance of receiving the contract. 28 U.S.C.A. § 1491(b)(1).

3 Cases that cite this headnote

[29] **Public Contracts** Parties; standing

United States Parties; standing

To have standing under the Tucker Act, the bid protester need only establish that it could compete for the contract. 28 U.S.C.A. § 1491(b)(1).

[30] **Public Contracts** Parties; standing

United States Parties; standing

Awardee of contract to provide aerial target flight operations and maintenance services to Army had standing, under Tucker Act and Article III, for bid protest challenging Army's proposed corrective action to terminate and resolicit contract, regardless of whether protester's challenge was considered preaward or postaward bid protest, since awardee established nontrivial competitive injury as actual bidder forced to compete for contract for second time and had direct economic interest in reopening of competition and re-award of contract, as protester would be forced to recompete for contract it had already won, its competitors would have advantage of knowing its original proposed price, and awardee had substantial chance of winning contract upon reopening of competition albeit presumably at less favorable terms than original contract award. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1491(b)(1).

4 Cases that cite this headnote

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[31] **Federal Courts** Nature of dispute; concreteness

A claim is not "ripe" for judicial review when the claim is contingent upon future events that may or may not occur.

[32] **Federal Courts** Administrative agencies and proceedings in general

The ripeness doctrine prevents the courts, through avoidance of premature adjudication, from entangling itself in abstract disagreements over administrative policies, and also protects the federal agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

[33] **Federal Courts** Ripeness; Prematurity

Federal Courts Prudential concerns

The ripeness doctrine derives from both Article III limitations on judicial power and from prudential reasons for the court to refuse to exercise jurisdiction. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[34] **Federal Courts** Fitness and hardship

In determining whether a claim is ripe for judicial review, courts must evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

[35] **Federal Courts** Administrative agencies and proceedings in general

The first prong of the ripeness analysis, requiring the court to determine the fitness of issues for judicial consideration, is not satisfied unless the challenged agency action is final.

[36] **Administrative Law and Procedure** Ripeness; prematurity

In the ripeness analysis of the fitness of the issues for judicial decision, a final agency action displays two characteristics: (1) the action must mark the consummation of the agency's decisionmaking process, in that it must not be of a merely tentative or interlocutory nature, and (2) the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

[37] **Administrative Law and Procedure** Ripeness; prematurity

The second prong of the ripeness analysis, requiring a determination of the hardship to the parties of withholding consideration by the court, is satisfied when the challenged agency action has an immediate, severe impact on the plaintiff.

[38] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Contract awardee's bid protest challenging Army's proposed corrective action to terminate and resolicit contract to provide aerial target flight operations and maintenance services was ripe, on grounds that Army's proposed corrective action constituted "final agency action," as required for fitness of issues for judicial decision, and created immediate severe hardship for awardee, since Army had committed to specific course of action, not merely tentative or interlocutory in nature, and decision immediately implicated awardee's right and obligation to perform under awarded contract, as awardee was unable to proceed with work under contract, depriving it of expected income and requiring expenditure of additional resources to recompete for same contract under far less favorable terms. U.S.C.A. Const. Art. 3, § 2, cl. 1.

2 Cases that cite this headnote

[39] **United States** Judgment on administrative record

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In ruling on cross-motions for judgment on the administrative record, Court of Federal Claims asks whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record. RCFC, Rule 52.1, 28 U.S.C.A.

[40] **United States** Judgment on administrative record

Because Court of Federal Claims makes factual findings from the record evidence, judgment on the administrative record is properly understood as intending to provide for an expedited trial on the administrative record. RCFC, Rule 52.1, 28 U.S.C.A.

[41] **Public Contracts** Scope of review

United States Scope of review

Under the arbitrary and capricious standard, Court of Federal Claims may set aside a procurement action if (1) the procurement official's decision lacked a rational basis, or (2) the procurement procedure involved a violation of regulation or procedure. 5 U.S.C.A. § 706(2)(A); 28 U.S.C.A. § 1491(b)(4).

2 Cases that cite this headnote

[42] **Public Contracts** Acceptance or Rejection

Public Contracts Scope of review

United States Acceptance or Rejection

United States Scope of review

Procurement officials are entitled to exercise discretion upon a broad range of issues confronting them in the procurement process; thus, when a protester challenges the procuring agency's decision as irrational, review by the Court of Federal Claims is highly deferential to the agency's decision, and the court is not empowered to substitute its judgment for that of the agency. 5 U.S.C.A. § 706(2)(A); 28 U.S.C.A. § 1491(b)(4).

2 Cases that cite this headnote

[43] **Public Contracts** Scope of review

United States Scope of review

Under the arbitrary and capricious standard of review of a procurement action, the Court of Federal Claims must determine whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion, and the disappointed bidder bears a heavy burden of showing that the award decision had no rational basis. 5 U.S.C.A. § 706(2)(A); 28 U.S.C.A. § 1491(b)(4).

4 Cases that cite this headnote

[44] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

When a bid protester claims that the procuring agency's decision violates a statute, regulation, or procedure, the bid protester must show that the violation was clear and prejudicial. 5 U.S.C.A. § 706(2)(A).

[45] **Public Contracts** Scope of review

United States Scope of review

Court of Federal Claims, in deciding the propriety of a procuring agency's implementation of corrective action recommended by the General Government Accountability Office (GAO), may review whether the GAO's recommendation was itself rational.

3 Cases that cite this headnote

[46] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Court of Federal Claims has a broad mandate to entertain bid protests and review government

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procurement decisions. 28 U.S.C.A. § 1491(b)(1).

1 Cases that cite this headnote

[47] **Public Contracts** Scope of review

United States Scope of review

If a procuring agency takes an action that is challenged in the Court of Federal Claims, the court has the responsibility to examine the basis for the agency's action, regardless of what that basis might be; in other words, when determining the propriety of a procuring agency's decision to take corrective action, the court may review the rationality of, as appropriate, the underlying formal Government Accountability Office (GAO) decision containing a recommendation that the agency take such action or the underlying informal suggestion by the GAO, or any other entity or individual, that such action might be proper.

5 Cases that cite this headnote

[48] **Public Contracts** Scope of review

United States Scope of review

Army's reliance on impressions conveyed by Government Accountability Office (GAO) attorney in e-mail message, as basis for Army's decision to take corrective action to terminate and resolicit contract to provide aerial target flight operations and maintenance services, rendered e-mail message subject to review for rationality, in same manner that review of formal GAO decision recommending corrective action was reviewable.

1 Cases that cite this headnote

[49] **Public Contracts** Failure to enter into contract; cancellation of solicitation

United States Failure to enter into contract; cancellation of solicitation

To extent that Army relied on Government Accountability Office (GAO) attorney's e-mail message to take corrective action to terminate and resolicit contract to provide aerial target flight operations and maintenance services, Army's decision lacked rational basis, on grounds that underlying e-mail message was irrational, since GAO attorney's declaration that timeliness of bid protest by parent of incumbent contractor was irrelevant was contrary to statute prohibiting GAO from entertaining untimely protests, and GAO attorney completely misconstrued source selection decision memorandum that was entitled to deference as to conclusions that proposals by awardee and incumbent contractor were not identical, that price/cost advantages of awardee's proposal outweighed possibility of learning curve impact, and that value of incumbency was not worth price premium. 31 U.S.C.A. § 3552(a); 4 C.F.R. § 21.5(e).

[50] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Except under limited circumstances, the Government Accountability Office (GAO) may not entertain untimely protests because they are not filed in accordance with the governing statutes. 31 U.S.C. § 3552(a); 4 C.F.R. § 21.5(e).

[51] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

When the Government Accountability Office (GAO) acts in violation of the law governing bid protests, the act lacks a rational basis.

[52] **Public Contracts** Administrative procedures in general

Public Contracts Scope of review

United States Administrative procedures in general

United States Scope of review

Government Accountability Office (GAO) applies a different standard of review to bid

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protests than does the Court of Federal Claims; while the GAO is charged with determining whether a procuring agency has violated a statute or regulation, the Court of Federal Claims must determine whether the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and an agency acting in good faith may still violate this standard. 28 U.S.C.A. § 1491(b)(1); 31 U.S.C.A. § 3552(a); 4 C.F.R. § 21.5(e).

2 Cases that cite this headnote

[53] **Public Contracts** Scope of review

United States Scope of review

As with all procurement decisions, an agency has broad discretion to take necessary corrective action; accordingly, Court of Federal Claims affords deference to the agency's decision to take corrective action and will uphold the decision if it is rational, reasonable, and coherent and reflects due consideration of all relevant factors.

13 Cases that cite this headnote

[54] **Public Contracts** Failure to enter into contract; cancellation of solicitation

United States Failure to enter into contract; cancellation of solicitation

Army's decision to take corrective action to terminate and resolicit contract to provide aerial target flight operations and maintenance services, lacked rational basis, in response to incumbent contractor's initial and supplemental bid protests to Government Accountability Office (GAO), even if Army did not rely on GAO attorney's underlying irrational e-mail message, since source selection decision was rational exercise of Army's discretion that should not have been disturbed, and source selection authority's tradeoff analysis permissibly considered differences among proposals.

[55] **Labor and Employment** Successor employers

Service Contract Act does not require successor contractors to comply with any provision of a predecessor's collective bargaining agreement (CBA) other than the wage and fringe benefit provisions. 29 C.F.R. § 4.163(a).

1 Cases that cite this headnote

[56] **Public Contracts** Determinative Factors in Making Award

Public Contracts Scope of review

United States Determinative Factors in Making Award

United States Scope of review

The procuring agency has broad discretion to determine which proposal represents the best value to the government; accordingly, Court of Federal Claims will not disturb the ratings assigned by the agency absent a showing that they have no rational basis.

2 Cases that cite this headnote

[57] **United States** Procedure in General

Although the Court of Federal Claims does not look favorably on arguments first raised in a reply, the court maintains the discretion to consider those arguments.

[58] **Public Contracts** Determinative Factors in Making Award

United States Determinative Factors in Making Award

It is incumbent upon the procuring agency and the Court of Federal Claims to look beyond adjectival ratings of proposals, because proposals with the same adjectival rating are not necessarily of equal quality.

1 Cases that cite this headnote

[59] **Public Contracts** Failure to enter into contract; cancellation of solicitation

United States Failure to enter into contract; cancellation of solicitation

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Army's decision to take corrective action to terminate and resolicit contract to provide aerial target flight operations and maintenance services, in response to incumbent contractor's bid protest, unlawfully violated laws guaranteeing fair competition in government procurements, since Army's decision to take corrective action upset appropriately awarded contract based on proper evaluation of proposals and source selection decision. 10 U.S.C.A. §§ 2304(a), 2305(f).

6 Cases that cite this headnote

[60] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

If a bid protester demonstrates that there was a significant error in the procurement process, the protester must then show that the error prejudiced it.

[61] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

To establish prejudice from a significant error in the procurement process, a bid protester must show that there was a substantial chance that it would have received the contract award absent the alleged error.

[62] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

Awardee of contract to provide aerial target flight operations and maintenance services to Army was prejudiced by Army's irrational and unlawful proposed corrective action to terminate and resolicit contract, since awardee would have retained contract but for Army's proposed corrective action, and thus was 100% certain to be contract awardee absent Army's error.

2 Cases that cite this headnote

[63] **Injunction** Award of contract; bids and bidders

Injunctive relief is appropriate if it enjoins the illegal action and returns the federal contract award process to the status quo ante.

[64] **Injunction** Award of contract; bids and bidders

In entertaining a request for permanent injunctive relief, Court of Federal Claims must review the procuring agency's action and determine whether (1) the protester has succeeded on the merits, (2) the protester will suffer irreparable harm if the court withholds injunctive relief, (3) the balance of hardships favors the grant of injunctive relief, and (4) it is in the public interest to grant injunctive relief.

6 Cases that cite this headnote

[65] **Injunction** Award of contract; bids and bidders

Contract awardee seeking permanent injunction prohibiting Army from undertaking proposed corrective action to terminate and resolicit contract to provide aerial target flight operations and maintenance services succeeded on merits of claim that Army's proposed corrective action constituted significant prejudicial error in procurement process.

1 Cases that cite this headnote

[66] **Injunction** Award of contract; bids and bidders

Awardee of contract to provide aerial target flight operations and maintenance services to Army would suffer irreparable harm in absence of permanent injunction preventing the implementation of Army's proposed corrective action to terminate and resolicit contract, since awardee would both lose valuable contract that it had lawfully won and would be forced to expend additional resources to recompete

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in circumstances in which there was unequal disclosure regarding offerors' proposed prices.

4 Cases that cite this headnote

[67] **Injunction** Award of contract; bids and bidders

Balance of hardships favored permanent injunction prohibiting Army from undertaking proposed corrective action to terminate and resolicit contract to provide aerial target flight operations and maintenance services, since Army would be required to spend time, money, and energy on proposed corrective action even though properly awarded contract already existed.

[68] **Injunction** Award of contract; bids and bidders

Public interest in fair and open competition in government procurement process supported grant of permanent injunction prohibiting Army from undertaking proposed corrective action to terminate and resolicit contract to provide aerial target flight operations and maintenance services, since Army's corrective action would upset contract awarded through fair and open competition, thus rendering proposed competition unfair, and government failed to explain how upholding lawfully awarded contract would negatively affect national defense or security. 28 U.S.C.A. § 1491(b)(3).

2 Cases that cite this headnote

[69] **Injunction** Award of contract; bids and bidders

While Court of Federal Claims must give serious consideration to national defense concerns in weighing the public interest to determine whether permanent injunctive relief is appropriate, under the Tucker Act, and arguably should err on the side of caution when such vital interests are at stake, allegations involving national security must be evaluated with the same analytical rigor as other allegations of potential harm to parties or to the public. 28 U.S.C.A. § 1491(b)(3).

Attorneys and Law Firms

***693** Craig A. Holman, Washington, DC, for plaintiff.

Matthew F. Scarlato, United States Department of Justice, Washington, DC, for defendant.

Stephen D. Davis II and Tod Dodgen, Huntsville, AL, for defendant-intervenor.

OPINION AND ORDER

SWEENEY, Judge.

The United States Army Aviation and Missile Life Cycle Management Command Contracting Center awarded a contract to Systems Application & Technologies, Inc. for aerial target flight operations and maintenance services, unseating the incumbent contractor, Madison Research Corporation, a wholly owned subsidiary of Kratos Defense & Security Solutions, Inc.[1] After Kratos protested the award to the Government Accountability Office ("GAO"), the Army indicated that it would take corrective action by terminating its contract with SA–TECH, amending the solicitation, accepting revised proposals, and making a new source selection decision. SA–TECH filed the instant protest to challenge the proposed corrective action, and has moved for judgment on the administrative record in its favor. The United States and Kratos move to dismiss SA– ***694** TECH's complaint for lack of jurisdiction and cross-move for judgment on the administrative record in their favor. For the reasons set forth below, the court denies the motions to dismiss, grants SA–TECH's motion for judgment on the administrative record, and denies the cross-motions for judgment on the administrative record.

I. BACKGROUND

A. The Solicitation

On June 1, 2010, the Army issued a final Request for Proposals ("RFP") to acquire aerial target flight operations and maintenance services in support of its subscale, ballistic, rotary wing, and ballistic missile target systems.[2] AR 59, 101, 199. As described in the RFP's Statement of Work ("SOW"), the services sought by the Army were "required for training programs, missile/weapon systems test and evaluation programs, missile/weapon systems lot acceptance programs, demonstrations, research and development activities, production verification, and special test programs." *Id.* at 101. To meet the requirements of the RFP, offerors would be required to provide sufficient qualified personnel and be capable of performing "up to three simultaneous missions comprised of a mixture of target systems...." *Id.* at 102. At the time the Army issued the RFP, Kratos was performing on the predecessor contract. *Id.* at 1509.

In the RFP, the Army specified that it would award the contract "to the responsible offeror whose offer, conforming to the solicitation, [was] most advantageous to the Government, cost or price and other factors ... considered." *Id.* at 270. Proposals would be evaluated using three criteria: Technical/Management, Past Performance, and Price/Cost. *Id.* The Technical/Management factor was split into Technical and Management subfactors, with the Technical subfactor being "significantly more important" than the Management subfactor. *Id.* Each subfactor had several elements. *Id.* at 270–71. Under the Technical subfactor, offerors would be evaluated on Technical Approach, Labor, and Sample Task elements. *Id.* at 270. The Technical Approach and Labor elements were "approximately equal in importance" and, taken individually, were "significantly more important" than the Sample Task element. *Id.* Under the Management subfactor, offerors would be evaluated on the following elements, listed in descending order of importance: Management Approach; Sample Task; Experience; and Participation by Small, Minority, and Disadvantaged Businesses. *Id.* at 270–71. Overall, the Technical/Management and Price/Cost factors were weighted approximately the same and, taken individually, were "significantly more important" than the Past Performance factor. *Id.* at 271. However, the Technical/Management and Past Performance factors, when combined, were "more important" than the Price/Cost factor. *Id.*

According to the Source Selection Plan, in evaluating the proposals, the Army planned to assign adjectival ratings to each of the elements in the Technical/Management factor reflecting the extent that each proposal would "result in effective and efficient performance" of the contract. *Id.* at 1435–38. An "outstanding" rating indicated complete confidence in that result, a "highly satisfactory" rating indicated high confidence in that result, a "satisfactory" rating indicated reasonable confidence in that result, a "marginal" rating indicated that the proposal might have that result, and an "unsatisfactory" rating indicated that the proposal was unlikely to have that result. *Id.; see also* *id.* at 1436 (noting that an "outstanding" rating for the Labor element reflected complete confidence ***695** that the proposed "labor mix, composition of directly charged hours, education, experience, and training" would "result in effective and efficient performance"). The Army would also assign adjectival ratings for the Past Performance factor indicating its level of doubt that the offeror could "successfully accomplish[ ]" the work. *Id.* at 1438. A "high" rating indicated significant doubt, a "medium" rating indicated some doubt, a "low" rating indicated little doubt, and an "unknown" rating indicated that there was no relevant past performance or experience upon which to issue a rating. *Id.* at 1440.

A Technical Evaluation Committee, appointed by the Source Selection Authority, would evaluate the offerors' proposals. *Id.* at 1428, 1431. The committee consisted of personnel with "a blend of technical, operational, and acquisition skills" who could provide "a thorough evaluation of the contractor technical proposals in accordance with the [SOW] and [the] source selection plan." *Id.* at 1428. Per the Source Selection Plan, the committee's findings were to be the basis for the source selection decision. *Id.* at 1432. Neither the Technical Evaluation Committee nor the Source Selection Authority were permitted to adjust those findings so that they would better fit an adjectival rating definition. *Id.*

Three elements of the Technical/Management factor are of particular importance in this protest. The first of these is the Labor element. To assist in the Army's evaluation, offerors were required to provide the following information in their proposals:

> (a) The labor mix (i.e. job categories and hours assumed for each) for the SOW as a whole.
>
> (b) Minimum and proposed levels of education, training and experience.
>
> (c) ... [E]ach labor category and number of employees per category utilized to calculate the proposed direct labor dollars....

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(d) ... [A] statement of minimum job qualifications/ standards for each labor category proposed....

(e) ... [R]esumes for each individual proposed for the following labor categories (or related contractor category). For individuals not presently employed, letters of commitment shall be included.

(a) Base/Program Manager

(b) Target System Supervisor/Leader

(c) Mechanic

(d) Avionics Technician

(e) TTCS Operator and Remote Control Supervisor

Id. at 267. The offerors were also required to report "the total number of personnel proposed" for each labor category described in the RFP, the total number of personnel proposed for labor categories other than the ones described in the RFP, and "the total number of personnel proposed to perform the requirements of the SOW." *Id.* In evaluating the Labor element, the Army would examine "[e]vidence of the availability of sufficient personnel with the required skills, experience, and of the proposed labor mix to assure effective and efficient performance." *Id.* at 270.

Also of importance are two elements of the Management subfactor. Under the Management Approach element, the offerors were required to describe their plan "for organizing, staffing, directing and controlling the work to be performed," *id.* at 268, and would be evaluated for the "overall efficacy" of their proposed approaches, *id.* at 271. Under the Participation by Small, Minority, and Disadvantaged Businesses element, the offerors were required to submit a participation plan for such businesses, *id.* at 268, and would be evaluated on the extent of such businesses' participation, including, among other things, the extent that such businesses were explicitly identified, *id.* at 271.

The RFP provided that the contract would be subject to the Service Contract Act of 1965. *Id.* at 237 (incorporating Federal Acquisition Regulation ("FAR") 52.222–41). Accordingly, the successful offeror would be required to pay its service employees performing under the contract a minimum amount of wages and fringe benefits, as specified in the relevant wage determination. FAR 52.222–41(c)(1). The relevant wage determination for the contract was identified in the RFP, which set forth FAR 52.222–42, Statement of Equivalent Rates for Federal ***696** Hires, as a contract clause. AR 237. In the original RFP, the clause included the following language: "Reference Wage Determination No. 05–2512, Revision 11, Dated 9/11/2009." *Id.* at 126. However, the referenced wage determination did not reflect the fact that personnel working under the incumbent contract had joined a union and were covered by a collective bargaining agreement ("CBA"). *Id.* at 64.

Kratos and Local Lodge 2515 of the International Association of Machinists and Aerospace Workers executed the CBA in June 2010, and it was to remain in effect from April 2010 to April 2013. *Id.* at 138, 164–65. On August 5, 2010, Kratos, which earlier that morning had received notice that the Army intended to extend its contract by five or six months, provided a copy of the CBA to the Army. *Id.* at 1393, 1423. Thus, on September 9, 2010, the Army issued Amendment 3 to the RFP to substitute a reference to a new wage determination, amending the relevant clause in the RFP to provide: "Reference Wage Determination No. 10–0110, Revision 1, Dated 8/17/2010." *Id.* at 125–26, 237. The new wage determination, which was made an attachment to the RFP, provided that in accordance with the Service Contract Act, "employees employed by the contractor(s) in performing services covered by the collective bargaining agreement(s) [were] to be paid wage rates and fringe benefits set forth in the current collective bargaining agreement and modified extension agreement(s)." *Id.* at 137. The CBA was included as part of the new wage determination. *Id.* at 138–66. Then, approximately two weeks after issuing Amendment 3, the Army issued Amendment 4 to the RFP, specifying that revision 13 of Wage Determination 05–2512, dated June 21, 2010, would apply to those labor categories not covered by the newly substituted wage determination. *Id.* at 167–68. The Army, in changing the wage determinations applicable to the contract in Amendments 3 and 4, did not change any related proposal requirements or evaluation criteria. *Id.* at 126, 168. It did, however, allow the offerors to submit revised proposals. *Id.*

B. Initial Evaluation of Proposals

Three offerors–SA–TECH, Kratos, and [...]—submitted proposals in response to the original RFP and revised proposals in response to Amendments 3 and 4. *Id.* at 1999–2000. Upon evaluating Kratos's proposal, the Technical Evaluation Committee assigned ratings of "outstanding" for

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the Technical/Management factor, both of its subfactors, the Labor element, and the Management Approach element, and a rating of "highly satisfactory" for the Participation by Small, Minority, and Disadvantaged Businesses element. *Id.* at 1765–68. For [...] proposal, the committee assigned ratings of "highly satisfactory" for the Technical/Management factor, the Technical subfactor, and the Labor element, and "outstanding" for the Management subfactor and all of its elements. *Id.* at 1769–72. And, with respect to SA–TECH's proposal, the committee assigned ratings of "satisfactory" for the Technical/Management factor and the Technical subfactor, and "outstanding" for the Management subfactor and all of its elements. *Id.* at 1775–78. The two "satisfactory" ratings for SA–TECH's proposal were based on a "marginal" rating for the Labor element, due to the committee's concerns about the lack of resumes and lack of demonstrated experience on certain Targets Management Office ("TMO") operational systems. *Id.* at 1776–77. The committee recommended a discussion issue for SA–TECH related to these concerns. *Id.* at 1774.

Based on the findings of the Technical Evaluation Committee, past performance evaluations, and the total price proposed by each of the offerors, all three offerors were included in the competitive range. *Id.* at 1494–97. Subsequently, the Army sent discussion issues to each offeror. *Id.* at 2000. SA–TECH, in response to its discussion issues, supplied the missing resumes and explained the extent to which its "proposed personnel [had] demonstrated experience with all the TMO target systems or other closely related sub-scale aerial target systems." *Id.* at 1299–1300. After discussions were closed, the Army requested final proposal revisions from the offerors. *Id.* at 193–94.

*697 C. Final Evaluation of Proposals

The Technical Evaluation Committee reviewed the submitted final proposal revisions and announced its findings in a Final Evaluation Report. *Id.* at 2000. Based on SA–TECH's discussion responses, the committee increased SA–TECH's Technical/Management factor, Technical subfactor, and Labor element ratings to "outstanding." *Id.* at 1373–74. In its evaluation of SA–TECH's proposal's Labor element, the committee's analysis included the following:

> [...]
>
> *Id.* at 1374–75. The committee made no adjustments to the "outstanding" rating it assigned to Kratos's proposal for the Labor element. [3] *Id.* at 866–67.

In its evaluation of the proposals under the Management subfactor, the Technical Evaluation Committee discussed the individual proposed by the offerors to serve as the base manager. [4] For SA–TECH's proposal, it noted:

> [...]
>
> *Id.* at 1375. For Kratos's proposal, it remarked:
>
> [...]
>
> *Id.* at 863. The committee assigned "outstanding" ratings to both SA–TECH and Kratos for the Management subfactor. *Id.* at 863, 1375. Finally, for the Participation by Small, Minority, and Disadvantaged Businesses element, the Technical Evaluation Committee continued to rate SA–TECH's proposal as "outstanding" and Kratos's proposal as "highly satisfactory." *Id.* at 864, 1376.

D. Source Selection Decision and Contract Award

After the Technical Evaluation Committee submitted its Final Evaluation Report, the Source Selection Authority prepared a Source Selection Decision Memorandum. *Id.* at 1999–2000. Based on "the factors and sub-factors established in the subject solicitation," her "integrated assessment of the proposals submitted in response to the solicitation," and her "review of the applicable facts and the collective judgment, recommendations, and evaluations performed by the Technical Evaluation Committee," the Source Selection Authority concluded that SA–TECH's proposal provided "the best overall value to satisfy the Army's need." *Id.* at 1999. She then set forth, in great detail, her evaluation of the proposals.

As part of her evaluation, the Source Selection Authority described the Army's adjectival ratings for each subfactor and element under the Technical/Management factor. [5] *Id.* at 2004, 2007. She indicated that all three offerors' proposals received "outstanding" ratings for each subfactor and element under the Technical/Management factor except the Participation by Small, Minority, and Disadvantaged Businesses element, for which each proposal received a "satisfactory" rating. *Id.* She then explained that for the Past Performance factor, the Performance Risk Assessment Group

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assigned "low" ratings to all three offerors, indicating that there was little doubt that they could successfully perform the contract. *Id.* at 2012. She further reported the "proposed/evaluated price/cost" of each offeror along with the Army's estimated cost: SA–TECH's proposed price was $26,980,807, [...] proposed price was [...], Kratos's proposed price was [...], and the Army's estimated cost was $31,719,556. *Id.* at 2013.

The Source Selection Authority's adjectival ratings were accompanied by narrative comments. Of importance here are certain comments she provided for three of the elements under the Technical/Management factor. For the Labor element, she discussed the experience of the personnel proposed for the contract. Addressing Kratos's proposal, she remarked: "As the incumbent contractor, Kratos/WSS has inherent advantages, ***698** one of which is the personnel with the specific experience on the TMO target systems. Kratos/WSS has proposed their current employees under this follow-on requirement, allowing for continuity of services without impact of learning curve." *Id.* at 2005. Then, addressing SA–TECH's proposal, she noted:

> [...]

Id. at 2005–06.

Also of importance are the Source Selection Authority's comments regarding the Management Approach element. For both SA–TECH and Kratos, she reiterated the Technical Evaluation Committee's comments concerning the proposed base managers. *Id.* at 2007, 2009. And, in her comments on the Participation by Small, Minority, and Disadvantaged Businesses element, she summarized the findings of the Office of Small Business Programs and assigned "satisfactory" ratings to both proposals. *Id.* at 2007–08, 2010. In particular, with respect to SA–TECH's proposal, she noted that SA–TECH did not specifically identify any small, minority, or disadvantaged businesses, but found that this failure was offset by its proposal to have such businesses perform specified services and provide specified materials. *Id.* at 2010.

After discussing the offerors' proposals, the Source Selection Authority engaged in a tradeoff analysis. *Id.* at 2013–14. She concluded that there were "no meaningful distinctions between the non-cost portions of the proposals...." *Id.* at 2013. Expanding on her conclusion, she indicated that SA–TECH had a minor weakness in the Participation by Small, Minority, and Disadvantaged Businesses element and that Kratos was the only offeror with no weaknesses. *Id.* Then, with respect to the experience levels of the personnel proposed by SA–TECH and Kratos, she explained:

> [...]

Id. at 2014. She further remarked that "SA–TECH proposed to maximize efficiency and workforce productivity" through the supplementation of contract personnel with personnel from its other contracts and that SA–TECH's approach was "geared towards creating a more productive, cost-effective work-force at an overall lower cost to the Government." *Id.* Accordingly, the Source Selection Authority determined that the "price/cost advantages of SA–TECH's proposal outweigh[ed] the possibility of a learning curve impact," *id.* at 2013, and concluded:

> Based on the evaluation criteria and basis for award, SA–TECH's overall outstanding technical/management rating and the lowest proposed/evaluated price/cost[ ] provides the Government with complete confidence for an effective and efficient performance with a low degree of risk.
>
> Therefore, [SA–TECH] is determined to offer the best value to the Government for the base and all options, in the amount of $26,980,807.

Id. The Army awarded the contract to SA–TECH on February 1, 2011, and notified the unsuccessful offerors that same day. *Id.* at 1501–06. The award notification letters disclosed the contract award price, which was the price offered by SA–TECH in its final proposal revision. *Id.* at 1504, 1506. The letters also revealed the adjectival ratings for the proposals of both the unsuccessful offeror and SA–TECH for the Technical/Management subfactors and Past Performance factor. *Id.* Thus, Kratos discovered SA–TECH's proposed price and that both Kratos's and SA–TECH's proposals received "outstanding" ratings for the Technical/Management subfactors and a "low" rating for the Past Performance factor. *Id.* at 1504.

E. Kratos's GAO Protest

Upon its timely request, Kratos received a debriefing from the Army regarding the contract award on February 17, 2011. *Id.* at 1509. Five days later, Kratos filed a protest with the GAO. *Id.* at 1508. It argued that the Army, by issuing Amendment 3, added a new requirement to the RFP, in that offerors were required to propose a labor mix in compliance with the CBA. *Id.* at 1510. It alleged that the Army failed

to consider the offerors' compliance with the CBA when evaluating their proposed labor mixes and that SA–TECH should have received a lower Technical/Management rating than Kratos because SA–TECH, which did not submit any resumes or letters of commitment from members of the union, could not have proposed ***699** the labor mix required by the CBA. *Id.* at 1509, 1512–13.

The Army requested that the GAO dismiss Kratos's protest, arguing generally that Amendment 3 did not contain any language indicating that it substantively changed the RFP to mandate the labor categories or purported labor mix set forth in the CBA. *Id.* at 1779. It offered three specific grounds for dismissal. *Id.* at 1781–83. First, it contended that the protest was untimely because Kratos alleged a defect in the RFP introduced by an amendment, and prospective offerors alleging such a defect must file a protest before the proposal due date following the incorporation of the amendment. *Id.* at 1781–82. Second, it asserted that Kratos was not an interested party because Kratos was not the next offeror in line to receive the contract if the GAO sustained the protest. *Id.* at 1782. Third, it argued that Kratos did not state a valid ground for protest because Amendment 3 did not introduce a new requirement into the RFP. *Id.* at 1782–83.

After reviewing the Army's dismissal request, the GAO attorney assigned to the protest found that the Army's interested party argument lacked merit. *Id.* at 1915. Then, with respect to the Army's other two arguments, he stated:

> If the solicitation mandated that offerors adopt the labor mix contained in the collective bargaining agreement (CBA), the protester has timely protested that the agency failed to evaluate offerors in accordance with that requirement. However, if the solicitation does not contain the requirement that offerors adopt the labor mix contained in the CBA, then the agency is correct that the allegation that the agency failed to evaluate proposals on whether they satisfied that nonexistent requirement does not state a valid basis of protest.

Id.

Kratos responded to the Army's dismissal request, advancing two arguments. *Id.* at 1916. First, it asserted that its protest was timely because it was not contending that the RFP was ambiguous, but that the RFP contained a requirement ignored by the Army. *Id.* Second, it argued that it met the minimum standard for protest: that its grounds were legally sufficient. *Id.* at 1917. The GAO attorney ultimately denied the Army's request for dismissal, without elaboration. *Id.* at 1920. The day after the denial, SA–TECH requested permission to intervene in the protest and the entry of a protective order. *Id.* at 1660.

The Army issued a stop-work order on the contract on March 22, 2011. *Id.* at 1667. Thereafter, it provided the GAO, Kratos, and SA–TECH with the required agency report, which included a statement from the contracting officer, a legal memorandum, and documents related to the procurement such as the Technical Evaluation Committee's Final Evaluation Report and the Source Selection Decision Memorandum. *Id.* at 1921, 1971–73. The principal argument advanced by the Army was that the CBA "did not contain a labor skill mix, but rather a handful of labor categories and prevailing rates," and was only added to the RFP "to provide prevailing wage rates," not to change the RFP's "evaluation criteria...." *Id.* It therefore requested that the GAO deny the protest. *Id.* at 1923.

After receiving the Army's report, the GAO attorney advised the parties that he was "dubious that the labor mix required under the CBA was incorporated into the RFP, but if Amendment 3 created a patent ambiguity, then the protest [was] likely untimely, and [the GAO] would not reach the merits of the allegations." *Id.* at 1939. The GAO attorney invited SA–TECH and Kratos to address the issue in their comments on the Army's report. *Id.*

SA–TECH responded to the Army's report on April 4, 2011, contending that Kratos incorrectly interpreted Amendment 3 to incorporate the CBA into the RFP. *Id.* at 1670. Amendment 3, SA–TECH asserted, merely referenced the new wage determination and underlying CBA to establish minimum wage and fringe benefit amounts for certain, specified labor categories. *Id.* SA–TECH argued that the protest was both untimely and meritless, and that Kratos did not demonstrate any competitive prejudice. *Id.* at 1671. It therefore requested that the GAO dismiss or deny the protest. *Id.* at 1670.

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***700** Kratos also responded to the Army's report on April 4, 2011. *Id.* at 1689. It agreed that the outcome of its protest turned on whether Amendment 3 to the RFP, by including the CBA, affected the labor mix proposed by the offerors and evaluated by the Army. *Id.* at 1702. Contending that the inclusion of the CBA did affect the RFP's requirements regarding the labor mix for the contract, it again argued that the Army did not properly evaluate the offerors' proposed labor mixes and that SA–TECH's proposal should have been rated lower than its own. *Id.* at 1703–06. In addition, Kratos's response included a new ground for protest based on the materials submitted with the Army's report ("supplemental protest"). *Id.* at 1689–91. It alleged that the Army's "systematic process of assigning an 'Outstanding' rating to every Factor for each bidder, regardless of the evaluator's comments and plain language of the proposals," improperly converted the "best-value determination into a lower-price, technically acceptable evaluation." *Id.* at 1689. In particular, it contrasted the Technical Evaluation Committee's assignment of an "outstanding" rating to SA–TECH's proposal under the Labor element with the Technical Evaluation Committee's comments highlighting its concern with SA–TECH's proposal. *Id.* at 1690. It also contended that SA–TECH's proposal's "outstanding" rating for the Management subfactor was inappropriate, given the [...] proposed by SA–TECH. *Id.* at 1700. Finally, it asserted that SA–TECH's proposal improperly received an "outstanding" rating for the Participation by Small, Minority, and Disadvantaged Businesses element given SA–TECH's failure to identify specific businesses. [6] *Id.* at 1701–02.

After receiving and reviewing the responses to the Army's report, the GAO attorney informed the parties on April 7, 2011, that he was "interested in whether, in light of the protester's challenges to the agency's technical evaluation, the agency [was] more inclined to continue to defend the protest or take corrective action." *Id.* at 1940. Upon SA–TECH's inquiry, he explained that he intended "to suggest ... that, on the face of it, the protester offer [ed] a straight forward argument as to why the agency's evaluation of the technical portions of the proposals was unreasonable." *Id.* at 1941. He elaborated that based on his experience, "an early indication of that assessment ... [could] assist an agency in determining appropriate next steps," and that while some agencies proceeded to successfully defend their awards, "more frequently," agencies "shared [the GAO's] concern and responded accordingly." *Id.*

SA–TECH responded to Kratos's supplemental protest on April 11, 2011. *Id.* at 1944. It contended that the supplemental protest actually contained two new grounds—the Army's alleged improper evaluation of proposals and the Army's purported conversion of a best-value procurement into a lower-price, technically acceptable procurement. *Id.* at 1944–45. It then advanced four arguments. First, it argued that the supplemental protest in its entirety was untimely because Kratos knew the factual basis of its new allegations more than ten days before it asserted them in response to the Army's report. *Id.* at 1945. It also contended that Kratos was not an interested party with respect to its allegation that the Army improperly evaluated the proposals because Kratos was not next in line for contract award. *Id.* at 1945–46. Third, it asserted that Kratos's allegation that the Army improperly converted the protest was based on pure speculation. *Id.* at 1944, 1946. Finally, it argued that Kratos did not plead or establish competitive prejudice with respect to either aspect of its supplemental protest. *Id.* SA–TECH therefore requested that the GAO dismiss the supplemental protest. *Id.* at 1962.

Later that day, the GAO attorney invited Kratos to respond to SA–TECH's dismissal request and the Army to respond "only" to Kratos's April 4, 2011 comments regarding the initial protest. *Id.* at 1974. In its response, the Army reiterated its position that the protest should be denied. *Id.* at 1991–93. ***701** Kratos, in its response, first emphasized that it was only asserting one supplemental ground for protest—that the Army's ratings and analysis were irreconcilable—and that SA–TECH failed to address that ground. *Id.* at 1977. Second, it contended that its supplemental protest both satisfied the dismissal standard and gave the GAO "sufficient reason" to sustain its protest. *Id.* More particularly, Kratos indicated that it could not have known about the discordance between the ratings and analysis until it received the Army's report, that it was unquestionably an interested party, and that the Army's improper evaluation was obviously prejudicial to it. *Id.* at 1977–78. Kratos accordingly requested that SA–TECH's dismissal request be denied. *Id.* at 1989.

In an April 20, 2011 electronic-mail message sent to all of the parties, the GAO attorney addressed Kratos's supplemental protest:

> The agency rated the awardee Outstanding under the Labor element.... This rating seems unreasonable, given the definition of Outstanding and the concerns expressed by the agency.

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> *We need not resolve the issue of whether that evaluation was reasonable or whether the protester timely challenged it,* given the deficiencies in the source selection decision memorandum. The [memorandum] stated that "there are no meaningful distinctions between the non-cost portions of the proposals." To substantiate this claim the [memorandum] recounted as follows: The main difference between the two offerors was that the protester had the incumbent work force under its employ and proposed them; the now-awardee "mitigat[ed]" this advantage [...] personnel and by stating that they have a [...] on newly awarded contracts. These statements do not accurately reflect the agency's final evaluation report, which, in often-quot[ed] language, says that the awardee [...] but there is no guarantee of success, as evidenced by the lack of letters of commitment, and goes on to express considerable concern with the awardee's proposal. *The source selection fails to acknowledge and appreciate the concerns expressed in the evaluation of the Labor element, which serves as a key discriminator between the proposals.* That the two proposals were rated the same for this element is highly irrelevant; regardless of ratings, the source selection must look behind those ratings to consider the distinctions uncovered in the evaluation. This source selection document fails to do that.
>
> *Had the agency said, we recognize the value of incumbency and the advantage of the reduced risk in the incumbent's proposal, but that advantage is not worth the premium over the awardee's proposal, we would in all likelihood deny a challenge to the best value trade-off.* Those are not the facts here. Here, the agency denied that there were proposal discriminators—documented in its evaluation—and there was a trade-off to be made between, on the one hand, an incumbent who guaranteed to deliver an experienced work force, and, on the other, a lower-priced offeror who did not and about whom the agency expressed reservations. We would likely sustain the protest on that ground.

Id. at 1995 (third alteration in the original) (emphasis added) (citations omitted).

F. Proposed Corrective Action

The Army initially responded to the electronic-mail message that same day, indicating that the GAO attorney's "discussion" was "clear" and that it did not anticipate "request[ing] outcome prediction." SAR 1. Then, in a letter dated April 22, 2011, the Army informed the GAO that it intended to take corrective action:

> On February 22, 2011, Kratos ... filed their initial protest challenging the Army's award to [SA–TECH] for aerial target flight operations and maintenance services. The initial protest alleged that the Army should have evaluated the Technical/Management Factor in accordance with the "labor mix" incorporated in Kratos' [CBA]. On April 4, 2011, Kratos filed a supplemental protest alleging that the Army inappropriately rated SA–TECH's Technical/Management proposal as Outstanding and converted the best value determination ***702** into a low price/technically acceptable evaluation.
>
> After a review of the supplemental issues, the Army has determined that it is in its best interest to take corrective action. The Army intends to terminate the contract awarded to SA–TECH so that it can reopen the original solicitation. The solicitation will then be amended to explain the intention of providing Kratos' CBA in the solicitation. If after the amendment is issued [and] the offerors wish to, they may revise their technical and cost proposals. The technical and cost proposals will be evaluated and, if necessary, the Agency reserves the right to conduct discussions. A new source selection decision will then be executed and announced.

AR 1996–97. The Army therefore requested that the GAO dismiss Kratos's protest. *Id.* at 1997. The GAO dismissed the protest on April 25, 2011. [7] *Id.* at 1998.

SA–TECH filed this protest on May 4, 2011, challenging the Army's proposed corrective action. In its first claim for relief, SA–TECH contends that the Army's decision to take corrective action is arbitrary, capricious, and unreasonable because the decision is based on an electronic-mail message from a GAO attorney that is itself unreasonable. Compl. ¶¶ 69–79. Accordingly, it requests that the court declare that (1) the contents of the GAO attorney's electronic-mail message and the Army's decision to take corrective action in response to the message are "arbitrary and capricious and contrary to precedent, unwarranted, and overbroad" and (2) its contract with the Army is "valid and not subject to corrective action" based on the GAO protest. *Id.* ¶ 79. In its second claim for relief, SA–TECH contends that the Army's proposed corrective action lacks a rational basis and involves a violation of law, regulation, or procedure. *Id.* ¶¶ 80–87. Accordingly, it requests that the court declare that (1) the Army's decision to take corrective action is "arbitrary

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and capricious and contrary to precedent, unwarranted, and overbroad" and (2) its contract with the Army is "valid and not subject to corrective action...." *Id.* ¶ 87.

In addition, under both claims for relief, SA–TECH requests that the court enjoin the Army from terminating its contract with SA–TECH and taking further corrective action, whether it is the action proposed by the Army in its April 22, 2011 letter or some other corrective action. *Id.* ¶¶ 79, 87. And, in the event that the court concludes that corrective action is appropriate, SA–TECH requests that the court declare that the Army's proposed amendment to the solicitation and invitation to submit revised proposals is "arbitrary and capricious, contrary to precedent, unwarranted, and overbroad" and enjoin the Army from amending the solicitation and inviting revised proposals. *Id.* The Army has stayed the implementation of its proposed corrective action pending this protest.

Now before the court are the United States' and Kratos's motions to dismiss for lack of jurisdiction and the parties' cross-motions for judgment on the administrative record. The court heard argument on the motions on August 3, 2011.

II. THE MOTIONS TO DISMISS

[1] [2] [3] As an initial matter, United States and Kratos contend that the United States Court of Federal Claims ("Court of Federal Claims") lacks jurisdiction to entertain SA–TECH's protest, arguing that the court's bid protest jurisdiction does not extend to claims related to a procuring agency's proposed corrective action. In ruling on a motion to dismiss, the court generally assumes that the allegations in the complaint are true and construes those allegations in the plaintiff's favor. *Henke v. United States,* 60 F.3d 795, 797 (Fed.Cir.1995). However, if a defendant challenges the factual basis of the court's jurisdiction, contested allegations in the complaint are not controlling. *Cedars–Sinai Med. Ctr. v. Watkins,* 11 F.3d 1573, 1583 (Fed.Cir.1993). Rather, the plaintiff must come forward with a preponderance of evidence in support of its jurisdictional allegations. ***703** *McNutt v. Gen. Motors Acceptance Corp.,* 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936). The court may therefore look to evidence outside of the pleadings to determine the existence of subject matter jurisdiction. *Land v. Dollar,* 330 U.S. 731, 735 & n. 4, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947). If the court finds that it lacks subject matter jurisdiction over a claim, Rule 12(h)(3) of the Rules of the United States Court of Federal Claims ("RCFC") requires the court to dismiss that claim.

A. The Court of Federal Claims Possesses Jurisdiction Under 28 U.S.C. § 1491(b)(1) to Consider SA–TECH's Protest

[4] [5] [6] [7] Whether the court has jurisdiction to decide the merits of a case is a threshold matter. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94–95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868). The parties or the court sua *sponte* may challenge the court's subject matter jurisdiction at any time. *Folden v. United States,* 379 F.3d 1344, 1354 (Fed.Cir.2004).

[8] [9] [10] The ability of this court to hear and decide suits against the United States is limited. "The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). The waiver of immunity "cannot be implied but must be unequivocally expressed." *United States v. King,* 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). The Tucker Act, the principal statute governing the jurisdiction of the Court of Federal Claims, waives sovereign immunity for claims against the United States in bid protests. [8] *See* 28 U.S.C. § 1491(b) (2006). Specifically, the Tucker Act provides that the Court of Federal Claims:

> shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement ... without regard to whether suit is instituted before or after the contract is awarded.

Id. § 1491(b)(1).

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[11] **[12]** SA–TECH contends that the court has jurisdiction to entertain its protest because it is "objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract ...." The court agrees. As an initial matter, the body of decisional law addressing challenges to a procuring agency's corrective action reflect that the bid protest jurisdiction of the Court of Federal Claims under 28 U.S.C. § 1491(b)(1) should be broadly construed. Some of these decisions concern corrective action that the procuring agency actually implemented; in other words, the contract was suspended or terminated, or the competition was reopened. In each of these protests, the deciding court either found or assumed that the Court of Federal Claims possessed subject matter jurisdiction.[9] Other decisions concern corrective ***704** action that the procuring agency proposed, but had not yet implemented.[10] In all but two of the protests, the courts once again explicitly ruled that the Court of Federal Claims possessed subject matter jurisdiction or implicitly made such a ruling by addressing the parties' arguments and rendering a merits-based decision.[11] And, neither of the decisions in which the Court of Federal Claims concluded that it lacked jurisdiction to entertain the protest addressed jurisdiction under the first prong of section 1491(b)(1). *See* *Outdoor Venture Corp. v. United States,* 100 Fed.Cl. 146, 151–56 (2011) (concluding that it lacked jurisdiction over the contract awardee's claim that the procuring agency would likely terminate its contract as a result of a successful size protest because (1) the awardee lacked standing under section 1491(b)(1) and (2) the decision to reopen a size determination was in the sole discretion of the Small Business Administration ("SBA")); *Data Monitor Sys., Inc. v. United States,* 74 Fed.Cl. 66, 72–73 (2006) (concluding that it lacked jurisdiction under section 1491(b)(1), but focusing exclusively on the fourth prong of the statute). The decisional law therefore suggests that the Court of Federal Claims possesses jurisdiction to entertain a variety of challenges relating to a procuring agency's corrective action.

[13] Indeed, the Court of Federal Claims possesses jurisdiction to resolve a broad range of disputes that may occur during the procurement process. On its face, 28 U.S.C. § 1491(b)(1) grants the court the authority to consider both preaward and postaward bid protests, and within those two all-encompassing categories, its language is expansive. The court may entertain objections to a solicitation, objections to a proposed award, objections to an award, objections related to a statutory or regulatory violation in connection with a procurement, and objections related to a statutory or regulatory violation in connection with a proposed procurement. Moreover, when Congress enacted the ADRA, there is no question that its intent was to consolidate the bid protest jurisdiction exercised by the federal courts, after a four-year period, with the Court of Federal Claims' preaward bid protest jurisdiction so that there would be but one judicial forum ***705** for all protests.[12] *See* *Res. Conservation Grp., LLC,* 597 F.3d at 1242–43; *Emery Worldwide Airlines, Inc.,* 264 F.3d at 1079–80; *see also* H.R.Rep. No. 104–841, at 10 (1996)H.R.Rep. No. 104–841, at 10 (1996) (Conf. Rep.) (explaining that the amendment to section 1491 would "consolidate[ ] federal court jurisdiction for procurement protest cases in the Court of Federal Claims" and that it was the intention of the conference committee "to give the Court of Federal Claims exclusive jurisdiction over the full range of procurement protest cases previously subject to review in the federal district courts and the Court of Federal Claims"[13]); 142 Cong. Rec. H12277 (daily ed. Oct. 4, 1996) (statement of Rep. Maloney) (noting that a compromise provision allowed for concurrent jurisdiction in the federal district courts and the Court of Federal Claims for four years); 142 Cong. Rec. S11848 (daily ed. Sept. 30, 1996) (statement of Sen. Cohen) (stating that the amendment to section 1491 would "expand the bid protest jurisdiction of the Court of Federal Claims" and would eventually eliminate "forum shopping" and create "national uniformity"). In other words, after four years, the exclusive judicial forum for bid protests would be the Court of Federal Claims.

[14] In this case, SA–TECH, as the contract awardee, is challenging the Army's decision to take corrective action. Even though SA–TECH filed suit before the Army acted on its plan to take corrective action by terminating SA–TECH's contract and reopening competition, there is no dispute that, absent this suit, the Army would proceed with its plan. The jurisdictional grant in 28 U.S.C. § 1491(b)(1) applies to the entire procurement process. *See* *Res. Conservation Grp., LLC,* 597 F.3d at 1245 ("1491(b)(1) in its entirety is exclusively concerned with procurement solicitations and contracts."). And, the corrective action proposed by the Army is unquestionably part of its process for procuring aerial target flight operations and maintenance services. *See* *id.* at 1244 (noting that federal law defines "procurement" as

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including " 'all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.' " (emphasis omitted) (quoting 41 U.S.C. § 403(2) (2006))). Indeed, it would be a waste of time, money, and energy for SA–TECH to wait until the Army actually began to implement its proposed corrective action to file suit. Therefore, the court concludes that the Tucker Act's bid protest jurisdiction is sufficiently broad to encompass SA–TECH's protest, and, more particularly, that SA–TECH is objecting to a solicitation for proposals for a proposed contract under the first prong of section 1491(b)(1).

The counterarguments advanced by the opposing parties are not persuasive. Both the United States and Kratos argue that the court lacks jurisdiction to adjudicate SA–TECH's challenge of the Army's decision to terminate their contract because such a claim must be brought under the Contract Disputes Act of 1978 ("CDA"). SA–TECH, however, is not merely challenging the Army's plan to terminate its contract; rather, it is challenging the entire scope of the Army's decision to take corrective action. The inclusion of contract termination as part of that plan does not divest the court of its bid protest jurisdiction. *See Roxco, Ltd.,* 185 F.3d at 886 (rejecting the argument "that when the CDA aspect of a complaint is dominant, the court may not assume jurisdiction over those portions of the complaint that would otherwise arise under the court's bid protest jurisdiction" and holding that the existence of a potential CDA claim "does not deprive the Court of Federal Claims of jurisdiction over its cause of action under the bid ***706** protest provision of the Tucker Act"); *Griffy's Landscape Maint. LLC,* 51 Fed.Cl. at 673–74 (holding that under its bid protest jurisdiction, it could not consider a challenge to contract termination, but it could consider the companion challenge to the reopening of competition); *see also* *Turner Constr. Co.,* 645 F.3d at 1388 (noting that "once jurisdiction attaches, the Court of Federal Claims has broad equitable powers to fashion an appropriate remedy," including the reinstatement of a contract award). Moreover, the Army has not yet terminated its contract with SA–TECH. *See Roxco, Ltd.,* 185 F.3d at 886 (holding that because the Navy had not terminated the contract at the time the appellant filed suit, there was no jurisdiction under the CDA at that time). Therefore, the attempt to shoehorn SA–TECH's claims into the jurisdictional confines of the CDA are futile. *See* *Sheridan Corp.,* 95 Fed.Cl. at 150 (rejecting the contention that a challenge of corrective action was "a challenge of the Government's ability to terminate a contract for convenience" and therefore "beyond the Court's jurisdiction," noting that the plaintiff was "not challenging some abstract ability of the Government to terminate for convenience—it [was] challenging the propriety of the Government's chosen corrective action in relation to the RFP"); *Centech Grp., Inc.,* 78 Fed.Cl. at 507 (holding that the plaintiff was asserting a claim under the court's bid protest, not CDA, jurisdiction, noting that the plaintiff sought "to overturn preaward agency conduct in an ongoing procurement rescinding its original award and reopening discussions" and not "termination for convenience costs" or the reversal of a contracting officer's final decision). The United States further argues that, contrary to SA–TECH's contention, the court lacks jurisdiction under the fourth prong of 28 U.S.C. § 1491(b)(1) because SA–TECH has not alleged a violation of statute or regulation. Such an allegation is unnecessary, however, when a complaint, like SA–TECH's, falls within the first prong of section 1491(b)(1).

B. Justiciability

[15] **[16]** **[17]** In addition to urging that the court lacks jurisdiction to entertain SA–TECH's protest, the United States seeks the dismissal of SA–TECH's protest as nonjusticiable for lack of standing and as not ripe for judicial review. The court's jurisdictional and justiciability inquiries are distinct. *Baker v. Carr,* 369 U.S. 186, 198, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Murphy v. United States,* 993 F.2d 871, 872 (Fed.Cir.1993). An issue is justiciable if it is within the court's competency to supply relief. *Murphy,* 993 F.2d at 872; *see also* *Fisher v. United States,* 402 F.3d 1167, 1176 (Fed.Cir.2005) (panel portion) (noting that justiciability "encompasses a number of doctrines under which courts will decline to hear and decide a cause," including the "doctrines of standing, mootness, ripeness, and political question"). The court may therefore find that it possesses jurisdiction over the subject matter of a case but that the dispute is nonjusticiable. *Baker,* 369 U.S. at 198, 82 S.Ct. 691; *Oryszak v. Sullivan,* 576 F.3d 522, 526 n. 3 (D.C.Cir.2009) ("That a particular dispute is nonjusticiable, however, does not mean the court lacks jurisdiction over the subject matter."). Having found that it possesses jurisdiction over the subject matter of SA–TECH's complaint, the court turns to the justiciability issues raised by the United States, beginning with the question of SA–TECH's standing.

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1. SA–TECH Has Standing to Protest

[18] **[19]** **[20]** **[21]** "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The standing inquiry involves both Article III "case or controversy" limitations on federal jurisdiction and "prudential limitations on its exercise." [14] *Id.* SA–TECH ***707** bears the burden of establishing its standing to protest. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[22] **[23]** **[24]** **[25]** **[26]** **[27]** "The standing issue in this case is framed by 28 U.S.C. § 1491(b)(1), which ... imposes more stringent standing requirements than Article III." *Weeks Marine, Inc. v. United States,* 575 F.3d 1352, 1359 (Fed.Cir.2009). Under section 1491(b)(1), bid protests may only be brought by "interested parties." The term "interested party" is construed in accordance with the Competition in Contracting Act of 1984, and, accordingly, "standing under § 1491(b)(1) is limited to actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract." *Am. Fed'n of Gov't Employees v. United States,* 258 F.3d 1294, 1302 (Fed.Cir.2001) (citing 31 U.S.C. § 3551(2)(A) (2000)); *see also* *Info. Tech. & Applications Corp. v. United States,* 316 F.3d 1312, 1319 (Fed.Cir.2003) (interpreting this standard as requiring a protester to show that it was an interested party prejudiced by the procuring agency's action and holding that "because the question of prejudice goes directly to the question of standing, the prejudice issue must be reached before addressing the merits" [15]); *Myers Investigative & Sec. Servs., Inc. v. United States,* 275 F.3d 1366, 1370 (Fed.Cir.2002) (defining "prejudice" as "injury"). Therefore, SA–TECH must establish that it "(1) is an actual or prospective bidder, and (2) possesses the requisite direct economic interest." *Rex Serv. Corp. v. United States,* 448 F.3d 1305, 1307 (Fed.Cir.2006).

[28] **[29]** There are two tests for demonstrating a direct economic interest. In the preaward context, a protester must show "a 'non-trivial competitive injury which can be addressed by judicial relief.' " *Weeks Marine, Inc.,* 575 F.3d at 1362 (quoting *WinStar Commc'ns, Inc. v. United States,* 41 Fed.Cl. 748 (1998)). In the postaward context, a protester must show that it had a "substantial chance" of receiving the contract. *Rex Serv. Corp.,* 448 F.3d at 1307. In other words, "[t]o have standing, the plaintiff need only establish that it 'could compete for the contract'...." *Myers Investigative & Sec. Servs., Inc.,* 275 F.3d at 1370 (quoting *Impresa Construzioni Geom. Domenico Garufi,* 238 F.3d at 1334).

[30] The United States argues that SA–TECH lacks standing to pursue its protest because "SA–TECH has yet to suffer any injury of any kind" and cannot "demonstrate a 'direct economic interest' in the Army's decision because no final contract award has been made, and SA–TECH continues to maintain the award and may ultimately retain the contract." Def.'s Mot. 16. The United States' position cannot be sustained. SA–TECH unquestionably meets the first prong of the standing test because, as the current contract awardee, there is little doubt that it would be forced to compete for the contract for a second time once the Army reopens the competition—an action the Army intends to take, as represented to the GAO and this court. SA–TECH has also shown, under the second prong, that it has a direct economic interest in the reopening of competition and reaward of the contract, regardless ***708** of whether its challenge to the Army's proposed corrective action is considered to be a preaward or postaward bid protest. If the Army implements its proposed corrective action, SA–TECH would be forced to recompete for a contract it has already won, and its competitors would have the advantage of knowing its original proposed price. Thus, SA–TECH has established a nontrivial competitive injury. And, SA–TECH, as the current contract awardee, certainly has a substantial chance of winning the contract upon the reopening of competition, albeit, presumably, at less favorable terms than the original contract award.

Furthermore, in almost every decision in which the standing of a contract awardee to protest a procuring agency's corrective action was addressed, the court has concluded that the protester had standing. *See, e.g.,* *Jacobs Tech. Inc.,*

100 Fed.Cl. at 178; *Sheridan Corp.*, 95 Fed.Cl. at 149; *Centech Grp., Inc.*, 78 Fed.Cl. at 504; *Delaney Constr. Co.*, 56 Fed.Cl. at 474. The decision in *Delaney Construction Co.* is particularly instructive because it concerned, like this protest, a contract awardee's challenge to corrective action proposed, but not yet implemented, by the procuring agency. *See* 56 Fed.Cl. at 472–74. In that case, the court concluded that the contract awardee had standing: "With respect to the proposed corrective action, plaintiff is a prospective offeror whose direct economic interest would be affected by the new award of the contract which would occur on the basis of the corrective action at issue." *Id.* at 474. In fact, even the one decision in which a protester challenging the likely imposition of corrective action was found not to have standing supports standing in this protest. In *Outdoor Venture Corp.*, a contract awardee sought an injunction preventing the procuring agency from terminating the contract it had been awarded before the SBA determined that it was other than a small business. 100 Fed.Cl. at 148–50. That determination rendered the awardee ineligible to compete for the contract, which was set aside for a small business. *Id.* at 148. Before the agency had taken any action based on the SBA's size determination, the awardee filed suit in the Court of Federal Claims. *Id.* at 151–52. The awardee relied upon the decisions in *Jacobs Technology, Inc.*, *Sheridan Corp.*, and *Centech Group, Inc.* to support its standing argument. *Id.* at 153. The court distinguished these decisions on the ground that the awardee did "not allege that the government has resolicited the contract *or that it intend[ed] to do so*." *Id.* at 153 (emphasis added) (citations omitted); *see also id.* (holding that the protester's allegation that the procuring agency might be required to terminate the contract constituted a harm that was "neither concrete and particularized nor actual or imminent," but was instead a harm that was "conjectural or hypothetical" that did not confer standing to protest). *Outdoor Venture Corp.* is distinguishable from this protest for at least two reasons. First, SA–TECH has not been rendered ineligible to receive the awarded contract. Second, because SA–TECH alleges that the Army intends to reopen the competition, amend the RFP, and accept revised proposals as part of its corrective action, it has articulated actual harm that it will suffer. Because the United States has not supplied any reason to depart from the holdings of these prior decisions, the court finds that SA–TECH has standing to pursue this protest.

2. SA–TECH's Protest Is Ripe for Judicial Review

[31] **[32]** **[33]** The United States also contends that SA–TECH's protest is not ripe for judicial review.[16] A claim is not ripe for judicial review when it is contingent upon future events that may or may not occur. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985). The ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative ***709** decision has been formalized and its effects felt in a concrete way by the challenging parties," *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977), and it derives from both "Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003) (citing *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993)).

[34] **[35]** **[36]** **[37]** In determining whether a claim is ripe for judicial review, courts must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149, 87 S.Ct. 1507. The first prong of the ripeness analysis is not satisfied unless "the challenged agency action is final." *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1362 (Fed.Cir.2008); *accord NSK, Ltd. v. United States*, 510 F.3d 1375, 1384 (Fed.Cir.2007) (citing *Abbott Labs.*, 387 U.S. at 149, 87 S.Ct. 1507). A final agency action displays two characteristics. "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (citation omitted). "[S]econd, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' " *Id.* at 178, 117 S.Ct.

1154 (citation omitted). The second prong of the ripeness analysis is satisfied when the challenged agency action has an immediate, severe impact on the plaintiff. *Gardner v. Toilet Goods Ass'n,* 387 U.S. 167, 170, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967).

[38] The United States argues the SA–TECH has failed to satisfy the first prong of the ripeness test because the Army's decision to take corrective action does not constitute a final agency action. More particularly, it contends that the Army's decision to take corrective action will not be fully consummated unless and until the Army reawards the contract to an offeror other than SA–TECH and that no legal consequences flow from the Army's decision to take corrective action because SA–TECH remains the contract awardee. With respect to the second prong, the United States asserts that SA–TECH would suffer hardship only if the Army awarded the contract to another offeror. The court is not convinced by the United States' arguments.

The Army's decision to take corrective action was memorialized in an April 22, 2011 letter to the GAO, in which it indicated that it had reviewed the supplemental protest and declared that it was "in its best interest to take corrective action." AR 1996. This declaration is not tentative or interlocutory in nature. Rather, the Army represented that upon review of the protest lodged by Kratos, it would take corrective action. There is no indication that the Army would do anything other than what it proposed. In fact, the Army considered its decision to be final, as reflected by its specific request to the GAO that it dismiss Kratos's protest because the proposed corrective action rendered the protest moot. Defense counsel subsequently confirmed at oral argument that the Army's decision to take corrective action remains unchanged. He explained that if the court dismissed the protest as unripe, the Army would proceed with its plan of corrective action, terminating its contract with SA–TECH and reopening the competition. [17] Thus, it is clear that the Army has committed to a specific course of action; it is not merely mulling various actions it might take. Moreover, the Army's decision to take corrective action immediately implicates SA–TECH's right and obligation to perform under ***710** the awarded contract and sets the procurement process back in motion. Thus, the Army's decision to take corrective action is a final agency action reviewable by this court.

SA–TECH has also demonstrated that the Army's decision to take corrective action has caused a severe and immediate impact on its business. SA–TECH, the current contract awardee, has been unable to proceed with work under the contract, depriving it of the income it expected to receive. In addition, the Army's proposed corrective action will result in the termination of its contract and require it to expend additional resources to recompete for that same contract. Furthermore, now that SA–TECH's contract price is in the public domain, SA–TECH will not only have to compete against the unsuccessful offerors, it will also have to compete against itself. Thus, if SA–TECH is successful in being awarded the contract for the second time, it will undoubtedly be under far less favorable terms. Clearly, withholding judicial review of the Army's decision to take corrective action would create a hardship for SA–TECH.

The court's conclusion that SA–TECH's protest is ripe for review is in accord with other decisions addressing the issue. [18] *See* *Jacobs Tech. Inc.,* 100 Fed.Cl. at 176–78; *Sheridan Corp.,* 95 Fed.Cl. at 150; *Ceres Gulf, Inc.,* 94 Fed.Cl. at 317; *Centech Grp., Inc.,* 78 Fed.Cl. at 505–06. Moreover, as a prudential matter, the court sees no good reason to postpone review of SA–TECH's allegations until the Army implements its corrective action by terminating SA–TECH's contract and reopening the competition. Further factual development would not "significantly advance [the court's] ability to deal with the legal issues presented nor aid [it] in their resolution." *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.,* 438 U.S. 59, 82, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978); *accord* *Nat'l Park Hospitality Ass'n,* 538 U.S. at 812, 123 S.Ct. 2026; *Caraco Pharm. Labs., Ltd. v. Forest Labs.,* Inc., 527 F.3d 1278, 1295 (Fed.Cir.2008). And, if the court delayed its review of the Army's proposed corrective action until a new contract was awarded, as suggested by the United States, there is a chance that SA–TECH's challenge to the corrective action would no longer be reviewable. *See* *Blue & Gold Fleet, L.P. v. United States,* 492 F.3d 1308, 1313 (Fed.Cir.2007) ("[A] party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims."); *Sheridan Corp.,* 95 Fed.Cl. at 150 ("[W]ere the Court to dismiss [the protester]'s claims as not ripe for review, the current protest grounds later could be challenged as untimely if [the protester] does not prevail during the resolicitation process."); *Centech Grp., Inc.,*

78 Fed.Cl. at 505 ("[T]he process Defendant and Intervenor seek to impose—deferring judicial review until after award—would render the grounds of Plaintiff's current protest untimely after award."). Thus, having found SA–TECH's complaint to be ripe for review, the court addresses the merits of SA–TECH's claims.

III. THE PARTIES' CROSS–MOTIONS FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

[39] **[40]** Each party has filed a motion for judgment on the administrative record pursuant to RCFC 52.1, urging the court to enter judgment in its favor. In ruling on such motions, "the court asks whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record." *A & D Fire Prot.,* ***711** *Inc. v. United States,* 72 Fed.Cl. 126, 131 (2006) (citing *Bannum, Inc. v. United States,* 404 F.3d 1346, 1356 (Fed.Cir.2005) [19]) Because the court makes "factual findings ... from the record evidence," judgment on the administrative record "is properly understood as intending to provide for an expedited trial on the administrative record." *Bannum, Inc.,* 404 F.3d at 1356.

A. The Army's Decision to Take Corrective Action Constitutes a Significant Error in the Procurement Process

As previously noted, SA–TECH alleges three general grounds for its protest. First, it contends that the Army's decision to take corrective action is arbitrary, capricious, and unreasonable because the decision was based on an electronic-mail message from a GAO attorney that is itself unreasonable. Second, it asserts that the Army's proposed corrective action, standing on its own, lacks a rational basis and involves a violation of law, regulation, or procedure. Third, it avers that even if the decision to take corrective action is appropriate, the corrective action proposed by the Army is overly broad. The court concludes that SA–TECH's first two protest grounds have merit.

[41] In a bid protest, the Court of Federal Claims reviews the challenged agency action pursuant to the standards set forth in 5 U.S.C. § 706. 28 U.S.C. § 1491(b)(4). Although section 706 contains several standards, "the proper standard to be applied in bid protest cases is provided by 5 U.S.C. § 706(2)(A): a reviewing court shall set aside the agency action if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Banknote Corp. of Am. v. United States,* 365 F.3d 1345, 1350 (Fed.Cir.2004). Under this standard, the court "may set aside a procurement action if '(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.' " *Centech Grp., Inc.,* 554 F.3d at 1037 (quoting *Impresa Construzioni Geom. Domenico Garufi,* 238 F.3d at 1332).

[42] **[43]** **[44]** Procurement officials "are entitled to exercise discretion upon a broad range of issues confronting them in the procurement process." *Impresa Construzioni Geom. Domenico Garufi,* 238 F.3d at 1332 (internal quotation marks omitted). Thus, when a protester challenges the procuring agency's decision as irrational, the court's review is "highly deferential" to the agency's decision, *Advanced Data Concepts, Inc. v. United States,* 216 F.3d 1054, 1058 (Fed.Cir.2000), and "[t]he court is not empowered to substitute its judgment for that of the agency," *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). "Accordingly, the test for reviewing courts is to determine whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion, and the disappointed bidder bears a heavy burden of showing that the award decision had no rational basis." *Impresa Construzioni Geom. Domenico Garufi,* 238 F.3d at 1332–33 (citation and internal quotation marks omitted); *accord Advanced Data Concepts, Inc.,* 216 F.3d at 1058 ("The arbitrary and capricious standard ... requires a reviewing court to sustain an agency action evincing rational reasoning and consideration of relevant factors."). When a protester claims that the procuring agency's decision violates a statute, regulation, or procedure, it must show that the violation was "clear and prejudicial." *Impresa Construzioni Geom. Domenico Garufi,* 238 F.3d at 1333 (internal quotation marks omitted).

1. The Army's Reliance on the GAO Attorney's April 20, 2011 Electronic–Mail Message Renders Its Decision to Take Corrective Action Irrational

The first protest ground asserted by plaintiff—that the Army's decision to take corrective action is arbitrary, capricious, and unreasonable because the decision is based on an electronic-mail message from a GAO attorney that is itself unreasonable—raises two threshold issues: was the Army's decision to take corrective action premised on the GAO ***712** attorney's April 20, 2011 electronic-mail message and, to the extent that it was, is the court empowered to review the electronic-mail message for rationality in the same way it can review a formal decision by the GAO recommending corrective action?

To answer the first question, the court looks to the timeline of events reflected in the administrative record. Kratos lodged its supplemental protest on April 4, 2011. On April 7, 2011, the GAO attorney informed the parties that in light of the supplemental protest, he was interested in whether the Army would continue to oppose the protest or take corrective action. Then, on April 11, 2011, the GAO attorney invited the Army to respond to comments made by Kratos about its initial protest, but specifically requested that the Army not respond to Kratos's supplemental protest. The Army complied with the request; its response did not address Kratos's supplemental protest. On April 20, 2011, in the electronic-mail message at issue, the GAO attorney conveyed his impressions of Kratos's supplemental protest. In a response sent that same day, the Army indicated that it understood the GAO attorney's position. Then, on April 22, 2011, the Army informed the GAO and the other parties that, after reviewing the supplemental protest, it had decided to take corrective action. The Army's April 22, 2011 letter constituted its first formal response to Kratos's supplemental protest.

The timeline suggests two possible scenarios. One possibility is that the Army had been considering how to respond to the supplemental protest for more than two weeks, *i.e.,* from the time that it was first advanced by Kratos, and that its April 22, 2011 letter was the culmination of its deliberations. The fact that the Army did not address the merits of the supplemental protest before April 22, 2011, supports this scenario, as does the Army's failure to mention the GAO attorney's electronic-mail message in its letter. The other possibility is that the position taken by the Army in its April 22, 2011 letter was prompted by the GAO attorney's April 20, 2011 electronic-mail message. The brief period of time—two days—between the message and the letter supports this scenario. Given the ambiguity regarding the true basis of the Army's decision to take corrective action, the court finds it reasonable to assume that the decision was based, at least in part, on the GAO attorney's April 20, 2011 electronic-mail message.

Assuming that the Army based its decision to take corrective action on the impressions conveyed by the GAO attorney in his electronic-mail message, the court must next determine whether it can review the message in the same way it reviews a formal GAO decision recommending corrective action. This appears to be an issue of first impression.

[45] There is no question that a court, in deciding the propriety of a procuring agency's implementation of corrective action recommended by the GAO, may review whether the GAO's recommendation was itself rational. *See* *Honeywell, Inc. v. United States,* 870 F.2d 644, 648 (Fed.Cir.1989) ("[A] procurement agency's decision to follow the Comptroller General's recommendation, even though that recommendation differed from the contracting officer's initial decision, was proper unless the Comptroller General's decision itself was irrational."); *Centech Grp., Inc.,* 79 Fed.Cl. at 563 n. 2 ("[I]t is appropriate for this Court to consider the rationality of GAO's determination where the agency relied upon such determination in taking the corrective action at issue."). The decisional law reflects, however, that as a general rule, courts have reviewed GAO recommendations only when they were included as part of a formal GAO decision. *See* *John Reiner & Co. v. United States,* 325 F.2d 438, 442 (Ct.Cl.1963) ("[I]t is the usual policy, if not the obligation, of the procuring departments to accommodate themselves to positions *formally taken* by the [GAO] with respect to competitive bidding." (emphasis added)); *see also* *Interstate Rock Prods., Inc. v. United States,* 50 Fed.Cl. 349, 363 (2001) (citing *Honeywell* for the proposition that "to the extent that an agency chooses to follow the advice of the GAO, courts should only intervene if the advice the agency receives is 'irrational,' " and concluding that the prior GAO decisions relied upon by the procuring agency in rejecting a bid as unresponsive were "eminently rational"); *see also* *ManTech Telecomms.* ***713** *& Info. Sys. Corp.,* 49 Fed.Cl. at 62, 73–80 (analyzing, in a case where the procuring agency's proposed corrective action was based on the GAO's suggestion during the alternative dispute resolution process that it would sustain the protest before it, only whether the proposed corrective action was reasonable, and not whether the GAO's suggestion was rational).

[46] **[47]** **[48]** In the present case, there is no formal GAO decision sustaining Kratos's protest and recommending corrective action. Rather, there are only the informal and nonfinal impressions of the GAO attorney, expressed in an

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electronic-mail message, indicating that the GAO would likely sustain Kratos's supplemental protest. Nevertheless, the court has a broad mandate to entertain bid protests and review government procurement decisions. If a procuring agency takes an action that is challenged in this court, this court has the responsibility to examine the basis for the agency's action, regardless of what that basis might be. In other words, when determining the propriety of a procuring agency's decision to take corrective action, the court may review the rationality of, as appropriate, the underlying formal GAO decision containing a recommendation that the agency take such action or the underlying informal suggestion by the GAO, or any other entity or individual, that such action might be proper. Thus, the court concludes that because the Army relied upon the GAO attorney's electronic-mail message in deciding to take corrective action, and only because the Army relied upon the message, it may review the message to determine whether it was rational.

[49] The threshold issues thus resolved, the court turns to the substance of the GAO attorney's electronic-mail message. In his message, the GAO attorney reaches two conclusions. First, he opines that the GAO "need not resolve the issue of whether ... the protester timely challenged" the Army's evaluation of proposals. Second, he indicates that the GAO would likely sustain Kratos's protest due to deficiencies in the source selection decision. Both of these conclusions are irrational.

[50] The GAO is empowered to entertain protests "concerning an alleged violation of a procurement statute or regulation" so long as the protests are filed in accordance with the governing statutes. 31 U.S.C. § 3552(a) (2006). These statutes require the GAO to establish procedures for the "expeditious" resolution of the protests. *Id.* § 3555(a). Under this authority, the GAO adopted a regulation providing that the GAO "shall" dismiss a protest that is not timely filed, 4 C.F.R. § 21.5(e) (2011), unless it determines that the protest "raises issues significant to the procurement system" or finds that "good cause" exists to consider the protest, *id.* § 21.2(c). In other words, except under limited circumstances, the GAO may not entertain untimely protests because they are not filed in accordance with the governing statutes. The GAO's own decisions support this conclusion. *See, e.g., Patricia A. Thompson–Agency Tender Official,* B–310910.4, 2009 CPD ¶ 24 (Comp.Gen. Jan. 22, 2009) ("Our Bid Protest Regulations contain strict rules requiring timely submission of protests.... [T]he protest is untimely and, therefore, must be dismissed."); *Goel Servs., Inc.,* B–310822.2, 2008 CPD ¶ 99 (Comp.Gen. May 23, 2008) ("Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. In order to prevent these rules from becoming meaningless, exceptions are strictly construed and rarely used. The 'good cause' exception is limited to circumstances where some compelling reason beyond the protester's control prevents the protester from filing a timely protest. The significant issue exception is limited to untimely protests that raise issues of widespread interest to the procurement community, and which have not been considered on the merits in a prior decision." (citations omitted)); *Cornet, Inc.,* B–270330 *et al.,* 96–1 CPD ¶ 189 (Comp.Gen. Feb. 28, 1996) (noting that the protest regulations require the dismissal of untimely protests and dismissing supplemental protest grounds as untimely).

[51] Here, the GAO attorney asserted that the GAO "need not" consider the timeliness ***714** of Kratos's supplemental protest, and, although the court cannot completely discount the possibility that the GAO attorney was impliedly invoking one of the exceptions allowing the GAO to consider an untimely protest, there is no indication in the electronic-mail message that an exception to the timeliness rule applied. Thus, the GAO attorney's statement that the timeliness of Kratos's protest was irrelevant clearly contravenes the statutory mandate that the GAO not entertain untimely protests. When the GAO acts in violation of the law, the act lacks a rational basis. *See* *SP Sys., Inc. v. United States,* 86 Fed.Cl. 1, 13 (2009) ("If the GAO recommendation is ... plainly contrary to a statutory requirement, that decision is irrational and an agency action is not justifiably based upon it." (citing *Grunley Walsh Int'l, LLC v. United States,* 78 Fed.Cl. 35, 44 (2007))); *Cal. Marine Cleaning, Inc.,* 42 Fed.Cl. at 295–96 (holding that the GAO's misapplication of late bid rule set forth in the FAR was irrational, and therefore the agency's reliance on the GAO's decision was improper); *see also* *United States v. Amdahl Corp.,* 786 F.2d 387, 392–93 (Fed.Cir.1986) ("Administrative actions taken in violation of statutory authorization or requirement are of no effect."). The GAO attorney's statement on timeliness is therefore irrational.

The GAO attorney's analysis of the Army's evaluation of proposals suffers the same fate. In the Source Selection Decision Memorandum, the Source Selection Authority reported the findings from the Army's evaluation and

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concluded that there were "no meaningful distinctions" among the noncost elements of the proposals. AR 2013. The Source Selection Authority acknowledged, however, that the proposals submitted by Kratos and SA–TECH were not identical: "[T]he main difference between the two offerors is that, as the incumbent, Kratos/WSS has the personnel with the specific TMO experience in their current employment and has proposed these employees for the follow-on ATFS requirement." *Id.* at 2014. She then explained how SA–TECH's proposal mitigated those differences.

[...]

Id. In other words, she most assuredly compared the ability of Kratos, as the incumbent contractor, to supply personnel with specific experience with SA–TECH's proposal to supply personnel with general experience coupled with a plan to mitigate its failure to propose personnel with specific experience. She then concluded that the "price/cost advantages of SA–TECH's proposal outweigh [ed] the possibility of a learning curve impact." *Id.* at 2013. It is readily apparent that the Source Selection Authority, upon comparing the proposals of Kratos and SA–TECH, clearly determined that the two proposals were not meaningfully distinct in the area of personnel experience and concluded that the benefit to the Army of SA–TECH's lower price was worth the possibility that some of SA–TECH's employees would lack specific experience. Her conclusion is entitled to deference.[20] *See* *Lockheed Missiles & Space Co. v. Bentsen,* 4 F.3d 955, 958–59 (Fed.Cir.1993) ("Effective contracting demands broad discretion. Accordingly, agencies 'are entrusted with a good deal of discretion in determining which bid is the most advantageous to the Government.' " (citations omitted) (quoting *Tidewater Mgmt. Servs., Inc. v. United States,* 573 F.2d 65, 73 (Ct.Cl.1978))); *Gen. Offshore Corp.,* B–251969 *et al.,* 94–1 CPD ¶ 248 (Comp.Gen. Apr. 8, 1994) ("Where an evaluation is challenged, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the evaluation criteria and applicable statutes and regulations, since the relative merit of competing proposals is primarily a matter of administrative discretion."), *quoted in* *E.W. Bliss Co. v. United States,* 77 F.3d 445, 449 (Fed.Cir.1996).

The GAO attorney did not afford the proper deference to the Army's source selection decision. In fact, his electronic-mail message demonstrates that he completely misread the decision. He wrote:

> ***715** The source selection fails to acknowledge and appreciate the concerns expressed in the evaluation of the Labor element, which serves as a key discriminator between the proposals. That the two proposals were rated the same for this element is highly irrelevant; regardless of ratings, the source selection must look behind those ratings to consider the distinctions uncovered in the evaluation. This source selection document fails to do that.
>
> Had the agency said, we recognize the value of incumbency and the advantage of the reduced risk in the incumbent's proposal, but that advantage is not worth the premium over the awardee's proposal, we would in all likelihood deny a challenge to the best value trade-off. Those are not the facts here. Here, the agency denied that there were proposal discriminators—documented in its evaluation—and there was a trade-off to be made between, on the one hand, an incumbent who guaranteed to deliver an experienced work force, and, on the other, a lower-priced offeror who did not and about whom the agency expressed reservations.

AR 1995. First, contrary to the GAO attorney's observations, the Source Selection Authority did "acknowledge and appreciate the concerns" of the Technical Evaluation Committee regarding the experience of SA–TECH's proposed workforce; she set forth those concerns in her decision and explained that SA–TECH had sufficiently mitigated those concerns. The Source Selection Authority also "look[ed] behind [the] ratings to consider the distinctions" identified by the Technical Evaluation Committee; she both described the distinctions and explained why those distinctions were not meaningful. Third, despite the GAO attorney's representations, the Source Selection Authority "recognize[d] the value of incumbency" and concluded that the value of incumbency was not worth the price premium—in the Source Selection Decision Memorandum she acknowledged that Kratos, as the incumbent contractor, had personnel with specific experience and explained that the cost advantage of SA–TECH's proposal outweighed the lack of specific experience of its proposed personnel. Fourth, the Source Selection Authority acknowledged the distinctions between the proposals of Kratos and SA–TECH, finding them not to be meaningful; she did not, as the GAO attorney stated, "den[y] that there were proposal discriminators[.]" Finally, contrary to the GAO attorney's assertion, the Source Selection Authority described both a tradeoff between Kratos's incumbency and SA–TECH's mitigation efforts and a tradeoff between the proposed prices and the relative experience levels of the proposed personnel. All of these errors suggest that instead

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of applying the necessary amount of deference, the GAO attorney was substituting his judgment for that of the Army. He may not do so. *Turner Constr. Co.,* 645 F.3d at 1383 ("When an officer's decision is reasonable, neither a court nor the GAO may substitute its judgment for that of the agency."). Accordingly, his analysis of the source selection decision is irrational.

Because the GAO attorney improperly declared that the timeliness of Kratos's protest was irrelevant and completely misconstrued the Source Selection Decision Memorandum, the contents of the GAO attorney's April 20, 2011 electronic-mail message are irrational. As a result, to the extent that the Army's decision to take corrective action is based upon the message, it lacks a rational basis and is therefore arbitrary, capricious, and an abuse of discretion.

2. The Army's Decision to Take Corrective Action Is Irrational and Unlawful

[52] Although it is reasonable to assume that the Army's decision to take corrective action was based upon the GAO attorney's April 20, 2011 electronic-mail message, the administrative record also supports the possibility that the Army's decision was not prompted by the message, but instead reflects a conclusion arrived at independently, after an analysis of Kratos's supplemental protest. To the extent that the Army did not rely on the electronic-mail message, the court analyzes the Army's decision to take corrective action as it would any other procurement decision and determines whether the decision to take corrective action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The court will thus ***716** set aside the decision if it lacks a rational basis or involves a statutory or regulatory violation. [21]

a. The Army's Decision to Take Corrective Action Lacks a Rational Basis

[53] The court first addresses whether the Army's decision to take corrective action in this case has a rational basis. As with all procurement decisions, an agency has broad discretion to take necessary corrective action. *See* *Jacobs Tech. Inc.,* 100 Fed.Cl. at 190 (citing *Impresa Construzioni Geom. Domenico Garufi,* 238 F.3d at 1332). Accordingly, the court affords the Army's decision to take corrective action deference and will uphold the decision if it is rational, reasonable, and coherent and reflects due consideration of all relevant factors.

[54] The Army's decision to take corrective action in this case is set forth in one document: its April 22, 2011 letter to the GAO. The court's review of the Army's decision is therefore limited to the rationale supplied in that letter. *See* *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.,* 419 U.S. 281, 285–86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974) (holding that a court "may not supply a reasoned basis for the agency's action that the agency itself has not given"), *cited in* *OMV Med., Inc. v. United States,* 219 F.3d 1337, 1344 (Fed.Cir.2000) (applying the rule in a bid protest). In the letter, the Army briefly summarizes, in two sentences, Kratos's initial and supplemental protests. Then, without any analysis, it declares: "After a review of the supplemental issues, the Army has determined that it is in its best interest to take corrective action." AR 1996. Although the lack of explicit rationale is troubling, because the Army indicates that it plans to amend the RFP "to explain the intention of providing Kratos' CBA in the ***717** solicitation," allow revised proposals, and render a new source selection decision, the court infers that it was the Army's intent to take corrective action in response to all of the issues raised in Kratos's GAO protest. *See* *id.* at 286, 95 S.Ct. 438 ("[W]e will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."). Upon a review of the administrative record, the court concludes that the Army's decision to take corrective action in response to Kratos's GAO protest is irrational.

Kratos alleged in its initial protest that the Army, by issuing Amendment 3, required the offerors to propose a labor mix in compliance with the CBA and that the Army failed to consider the offerors' compliance with the CBA when evaluating their proposed labor mixes. However, there is no basis for Kratos's interpretation of Amendment 3, as consistently argued by the Army and suggested by the GAO attorney. The original RFP indicated that the successful offeror would be required to pay its employees a minimum amount of wages and fringe benefits, and that the relevant wage and fringe benefit amounts were described in the specified wage determination. After the Army and the incumbent contractor's employees agreed to a CBA, the Army issued Amendment 3 to substitute a new wage determination as the relevant source for minimum wage and fringe benefit amounts for specified

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labor categories, and Amendment 4 to provide a source for minimum wage and fringe benefit amounts for proposed employees not covered by the new wage determination. There is no indication in Amendment 3 that the Army intended to do anything other than change the minimum wage and fringe benefit amounts that the successful offeror would be required to pay its employees; the sections of the RFP describing the proposal requirements and evaluation criteria were not amended.

[55] That the CBA was included as part of the new wage determination does not alter the analysis; the purpose of the new wage determination was clearly identified as providing minimum wage and fringe benefit amounts that the successful offeror would be required to pay its employees. Moreover, the Service Contract Act does not require successor contractors to comply with any provision of a predecessor's CBA other than the wage and fringe benefit provisions. *See* 29 C.F.R. § 4.163(a) (2009) ("The obligation of the successor contractor is limited to the wage and fringe benefit requirements of the predecessor's collective bargaining agreement and does not extend to other items such as seniority, grievance procedures, work rules, overtime, etc."). Thus, the Army's decision to take corrective action in response to Kratos's initial protest concerning Amendment 3 to the RFP is irrational.

[56] In its supplemental protest, Kratos alleged that by assigning "outstanding" ratings to each factor for each proposal, the Army converted what was supposed to be a best-value determination into a lower-price, technically acceptable evaluation. It expressed particular concern with the Army's assignment of an "outstanding" rating to SA–TECH's proposal for the Labor element, an "outstanding" rating to SA–TECH's proposal for the Management subfactor, and a purported "outstanding" rating to SA–TECH's proposal for the Participation by Small, Minority, and Disadvantaged Businesses element in light of the Technical Evaluation Committee's comments in its Final Evaluation Report and the Source Selection Authority's comments in the Source Selection Decision Memorandum. As noted above, the Army has broad discretion to determine which proposal represents the best value to the government. *See* *Lockheed Missiles & Space Co.,* 4 F.3d at 958–59. Accordingly, the court will not disturb the ratings assigned by the agency absent a showing that they have no rational basis. *See* *E.W. Bliss Co.,* 77 F.3d at 445 (noting that "challenges to the procurement [that] deal with the minutiae of the procurement process in such matters as technical ratings ... involve discretionary determinations of procurement officials that a court will not second guess"). No such showing has been made with respect to Kratos's supplemental protest.

As an initial matter, the Technical Evaluation Committee was entitled to apply its experience and expertise and assign favorable ***718** ratings to SA–TECH's proposal even though it had some concerns with certain aspects of the proposal. *See* *Fort Carson Support Servs. v. United States,* 71 Fed.Cl. 571, 586 (2006) ("[T]he evaluation of proposals for their technical excellence or quality is a process that often requires the special expertise of procurement officials, and thus reviewing courts give the greatest deference possible to these determinations."). And, the Source Selection Authority was well within her rights to consider the Technical Evaluation Committee's Final Evaluation Report and determine the weight to give the committee's findings and whether the committee's concerns were mitigated by the committee's other findings. *See id.* In fact, it is her responsibility to independently make such a determination. *See* FAR 15.308 ("The source selection authority's ... decision shall be based on a comparative assessment of proposals against all source selection criteria in the solicitation. While the [source selection authority] may use reports and analyses prepared by others, the source selection decision shall represent the [source selection authority]'s independent judgment.").

[57] Nevertheless, Kratos contends for the first time in its reply that the Source Selection Authority deviated from the Technical Evaluation Committee's findings "to justify higher adjective definitions [sic]" in violation of the Source Selection Plan. Kratos's Reply 28–29. Although the court does not look favorably on arguments first raised in a reply, *Novosteel SA v. United States,* 284 F.3d 1261, 1274 (Fed.Cir.2002), it maintains the discretion to consider them, *SmithKline Beecham Corp. v. Apotex Corp.,* 439 F.3d 1312, 1320 n. 9 (Fed.Cir.2006). Kratos's argument regarding the requirements of the Source Selection Plan fails for three reasons. First, the Source Selection Plan prohibited the adjustment of findings to better match an adjectival rating definition, and, given the general nature of the prohibition, apparently applied to both the Technical Evaluation Committee and the Source Selection Authority. There is no evidence in the administrative record that the Technical Evaluation committee or the Source Selection Authority altered any of their findings to better fit an adjectival rating definition. Second, the Source Selection Authority did not assign adjectival ratings for any of the proposals that were higher

than those assigned by the Technical Evaluation Committee. In fact, she actually lowered the ratings for SA–TECH's and Kratos's proposals for the Participation by Small, Minority, and Disadvantaged Businesses element. Third, the Source Selection Authority did not deviate from the Technical Evaluation Committee's findings; rather, she evaluated and weighed those findings. Thus, as required by the Source Selection Plan, the committee's findings formed the basis for the source selection decision.

Accordingly, the Technical Evaluation Committee and the Source Selection Authority, in evaluating SA–TECH's proposal, were empowered to assign an "outstanding" rating for the Labor element even though they reported some concerns with the experience level of SA–TECH's proposed personnel. Such a rating meant that notwithstanding the noted concerns, the Technical Evaluation Committee and Source Selection Authority had complete confidence that SA–TECH could effectively and efficiently perform the work under the contract with its proposed labor mix, directly charged hours, and personnel. They could also assign an "outstanding" rating to SA–TECH's proposal for the Management subfactor even though SA–TECH's proposed [...] lacked the same amount of experience as the [...] proposed by Kratos, a rating that meant that despite the noted concerns, they had complete confidence that SA–TECH could perform the contract requirements effectively and efficiently. Similarly, the Technical Evaluation Committee and the Source Selection Authority could assign "outstanding" and "satisfactory" ratings, respectively, to SA–TECH's proposal for the Participation by Small, Minority, and Disadvantaged Businesses element even though SA–TECH did not identify specific businesses. The rating ultimately assigned by the Source Selection Authority meant that she had reasonable confidence that SA–TECH could effectively and efficiently perform the contract requirements. All three ratings assigned to SA–TECH's proposal reflected the Army's determination that SA– ***719** TECH could mitigate the Army's concerns and were, in that regard, entirely rational.

[58] Furthermore, the fact that the Army assigned all three proposals the same ratings does not render the ratings per se improper. *See United Concordia Cos. v. United States,* 99 Fed.Cl. 34, 42 (2011) ("That the [source selection authority] found [two offerors] to be equal in non-price factors, which coincides with their identical adjectival ratings for technical merit, proposal risk, and past performance, is not evidence of a lack of comparative assessment."). Indeed, it is incumbent upon the procuring agency and reviewing court to look beyond adjectival ratings because " '[p]roposals with the same adjectival rating are not necessarily of equal quality....' " *Metcalf Constr. Co. v. United States,* 53 Fed.Cl. 617, 640–41 (2002) (quoting *Oceaneering Int'l, Inc.,* B–287325, 2001 CPD ¶ 95 (Comp.Gen. June 5, 2001)). There has been no showing that the ratings themselves were irrational; the evidence in the administrative record supports the conclusion that the Source Selection Authority looked beyond the adjectival ratings and rendered a source selection decision based on the Technical Evaluation Committee's comments and her own review of the offerors' proposals. This is precisely the task that procuring officials are charged with performing.

In sum, because the source selection decision was a rational exercise of the Army's discretion and should therefore not be disturbed, the Army's decision to take corrective action in response to Kratos's protests is irrational. Moreover, to the extent that the Army determined, independently of GAO attorney, that the Source Selection Authority's tradeoff analysis did not properly consider the differences among the proposals, such a determination lacks a rational basis. *See supra* section III.A.1. Accordingly, whatever its basis, the Army's decision to take corrective action is arbitrary, capricious, and an abuse of discretion.

b. The Army's Decision to Take Corrective Action Violates Procurement Statutes and Regulations

[59] Although the court has determined that the Army's decision to take corrective action lacks a rational basis, it briefly considers whether the Army's decision to take corrective action also violates a statute or regulation. SA–TECH argues that the Army, in proposing corrective action, is violating the requirements that it promote and provide for full and open competition through the use of appropriate competitive procedures, 10 U.S.C. § 2304(a) (2006); FAR 6.101; award the contract to the successful offeror, FAR 15.504; and determine that the procurement did not comply with a statute or regulation, 10 U.S.C. § 2305(f); FAR 33.102(b). SA–TECH, in other words, contends that the Army's proposed corrective action disturbs a contract award made in compliance with the applicable statutes and regulations. The court agrees. Because the Army properly evaluated the offerors' proposals and rendered a source selection decision, its decision to take corrective action upsets a properly awarded contract and therefore violates

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the laws meant to guarantee fair competition in government procurements.

3. Summary

The Army's decision to take corrective action is arbitrary, capricious, an abuse of discretion, and unlawful, and therefore constitutes a significant error in the procurement process. Having so concluded, the court need not address SA–TECH's alternative contention that even if the decision to take corrective action was appropriate, the corrective action proposed by the Army is overly broad. The court's next inquiry, therefore, is whether SA–TECH is prejudiced by the Army's error.

B. SA–TECH Is Prejudiced by the Army's Decision to Take Corrective Action

[60] **[61]** If a protester demonstrates that there was "a significant error in the procurement process," it must then show "that the error prejudiced it." *Data Gen. Corp.*, 78 F.3d at 1562; *see also* *Bannum, Inc.*, 404 F.3d at 1351 (holding that if the procuring agency's decision lacked a rational basis or was made in violation of the applicable statutes, regulations, or procedures, the court must then "determine, as a factual matter, if the bid protester was prejudiced by that ***720** conduct"). "To establish prejudice ..., a protester must show that there was a 'substantial chance' it would have received the contract award absent the alleged error." *Banknote Corp. of Am.*, 365 F.3d at 1350 (quoting *Emery Worldwide Airlines, Inc.*, 264 F.3d at 1086); *see also* *Data Gen. Corp.*, 78 F.3d at 1562 ("[T]o establish prejudice, a protester must show that, had it not been for the alleged error in the procurement process, there was a reasonable likelihood that the protester would have been awarded the contract.").

[62] SA–TECH easily satisfies the prejudice inquiry. SA–TECH is the current contract awardee. Thus, the corrective action proposed by the Army would lead to the termination of a contract that SA–TECH already won. If the Army did not take its proposed corrective action, SA–TECH would retain its contract. It therefore has more than a substantial chance of being awarded the contract absent the Army's error; it is 100% certain to be the contract awardee.

IV. DECLARATORY AND INJUNCTIVE RELIEF

SA–TECH has demonstrated that the Army's decision to take corrective action constitutes a significant, prejudicial procurement error and that it is therefore entitled to a judgment in its favor. The court thus turns to SA–TECH's request for declaratory and injunctive relief. Such equitable remedies are available to successful protesters under the Tucker Act. *See* 28 U.S.C. § 1491(b)(2) (permitting the Court of Federal Claims to "award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs"). SA–TECH first seeks declarations that (1) the contents of the GAO attorney's April 20, 2011 electronic-mail message and the Army's decision to take corrective action in response to the message are "arbitrary and capricious and contrary to precedent, unwarranted, and overbroad"; (2) the Army's decision to take corrective action is "arbitrary and capricious and contrary to precedent, unwarranted, and overbroad"; and (3) its contract with the Army is "valid and not subject to corrective action" based on Kratos's GAO protest. Because the practical effect of this requested relief is to prevent the Army from taking the proposed corrective action, it is "tantamount to a request for injunctive relief." *PGBA, LLC v. United States*, 389 F.3d 1219, 1228 (Fed.Cir.2004). Thus, the court will limit its discussion to SA–TECH's request for the entry of a permanent injunction prohibiting the Army from undertaking its proposed corrective action. [22]

[63] **[64]** "Injunctive relief is appropriate if it 'enjoin[s] the illegal action and return[s] the contract award process to the status quo ante.' " *Turner Constr. Co.*, 645 F.3d at 1388 (quoting *Parcel 49C Ltd. P'ship v. United States*, 31 F.3d 1147, 1153 (Fed.Cir.1994)). In entertaining a request for permanent injunctive relief, a court must review the procuring agency's action and determine whether (1) the protester has succeeded on the merits; (2) the protester will suffer irreparable harm if the court withholds injunctive relief; (3) the balance of hardships favors the grant of injunctive relief; and (4) it is in the public interest to grant injunctive relief. *PGBA, LLC*, 389 F.3d at 1228–29.

[65] By demonstrating that the Army's proposed corrective action constitutes a significant, prejudicial error in the

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procurement process, SA–TECH has succeeded on the merits. The court concludes that SA–TECH also satisfies the remaining three factors justifying an award of injunctive relief.

[66] The first of these factors—irreparable harm—is satisfied because, absent an injunction preventing the implementation of ***721** the Army's proposed corrective action, SA–TECH would both lose a valuable contract that it has lawfully won and be forced to expend additional resources to recompete in circumstances where there has been unequal disclosure regarding the offerors' proposed prices.[23] As the court explained in *Sheridan Corp.:*

> [U]nless the agency's corrective action is enjoined, [the protester] faces irreparable harm from an unnecessary recompetition for a contract it has already won. Without an injunction, [the protester] may lose the contract and the associated revenues. Even if [the protester] is able to retain the contract following the proposed resolicitation, [the protester] would have been forced to recompete in circumstances where its winning price had already been revealed to the competition.

95 Fed.Cl. at 155. Moreover, because SA–TECH has established that it is prejudiced by the Army's decision to take corrective action, the court presumes that SA–TECH has suffered irreparable harm. *See* *Reebok Int'l Ltd. v. J. Baker, Inc.,* 32 F.3d 1552, 1556 (Fed.Cir.1994) ("A movant that clearly establishes likelihood of success on the merits receives the benefit of a presumption of irreparable harm."), *cited in* *CW Gov't Travel, Inc. v. United States,* 61 Fed.Cl. 559, 577 (2004).

[67] In addition, the balance of hardships weighs in SA–TECH's favor. If the Army was permitted to pursue its plan of corrective action, it would be required to spend time, money, and energy on terminating SA–TECH's contract, amending the RFP, reevaluating proposals, issuing a new source selection decision, and reawarding a contract. In fact, no benefit accrues to the Army by allowing it to proceed with its corrective action plan when a properly awarded contract already exists. If both the protester and the government stand to suffer harm in the absence of an injunction, then it makes good sense to issue the injunction.

[68] Further, the public interest is served by enjoining the Army from taking the proposed corrective action. This court has repeatedly recognized that there is an important public interest in fair and open competition in the government procurement process. *See, e.g.,* *Bona Fide Conglomerate, Inc. v. United States,* 96 Fed.Cl. 233, 242 (2010); *PGBA, LLC v. United States,* 57 Fed.Cl. 655, 663 (2003). The Army's implementation of corrective action would upset the award of a contract that was properly awarded through fair and open competition, rendering the competition unfair. Thus, rather than interfering with the procurement process or dictating what the Army must procure, as the United States argues, the court is merely upholding an award the Army lawfully made.

[69] As a final matter, the court must address the United States' contention that the court should decline to grant injunctive relief on national security grounds. The United States makes the sweeping assertion that because the contract at issue involves the testing and evaluation of missile/weapons systems, the court should disregard the merits of the protest and deny injunctive relief. In considering a bid protest, the court is required to "give due regard to the interests ***722** of national defense and national security...." 28 U.S.C. § 1491(b)(3). The United States Court of Appeals for the Federal Circuit has addressed this provision of the Tucker Act on only one occasion, when it remarked that "section 1491(b)(3) merely instructs courts to give due regard to the issue of national defense and national security in shaping relief." *PGBA, LLC,* 389 F.3d at 1226. On the other hand, section 1491(b)(3) has been addressed in many cases before the Court of Federal Claims. This court agrees with the following assessment:

> The Tucker Act requires that the Court consider the interest of national defense in its bid protest decisions. Nonetheless, "claims of national security ... are often advanced by the Government in challenges to procurement decisions. The Court will not blindly accede to such claims but is bound to give them the most careful consideration." While the Court certainly must give serious consideration to national defense concerns and arguably should err on the side of caution when such vital interests are at stake, allegations involving national security must be evaluated with the same analytical rigor as other allegations of potential harm to parties or to the public.

Gentex Corp. v. United States, 58 Fed.Cl. 634, 655 (2003) (citations omitted). Here, the United States has not explained how upholding a lawfully awarded contract would negatively

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affect the nation's defense or security. The court therefore finds that its assertion lacks merit.

V. CONCLUSION

In sum, the court finds that injunctive relief is appropriate in this case. Accordingly, it is **ORDERED** that:

- The motions to dismiss filed by the United States and Kratos are **DENIED;**
- The motion for judgment on the administrative record filed by SA–TECH is **GRANTED;**
- The cross-motions for judgment on the administrative record filed by the United States and Kratos are **DENIED;**
- The Army is **ENJOINED** from implementing the corrective action it proposed in its April 22, 2011 letter to the GAO in response to the GAO attorney's April 20, 2011 electronic-mail message and/or Kratos's GAO protest; and
- The court has filed this opinion under seal. The parties shall confer to determine proposed redactions agreeable to all parties. Then, by **no later than Wednesday, August 24, 2011,** the parties shall file a joint status report indicating their agreement with the proposed redactions, **attaching a copy of those pages of the court's opinion containing proposed redactions, with all proposed redactions clearly indicated.**

No costs. The clerk is directed to enter judgment accordingly.

All Citations

100 Fed.Cl. 687

Footnotes

* This reissued Opinion and Order incorporates the redactions proposed by the parties on August 23, 2011. Redactions are indicated with a bracketed ellipsis ("[...]").

1 For simplicity, the court will refer to the awarding agency as "the Army." And, in conformance with the parties' usages, the court will refer to plaintiff as "SA–TECH" and defendant-intervenor as "Kratos."

2 The court derives the facts in this section from the administrative record ("AR"), the two-page supplement to the administrative record ("SAR"), and the complaint ("Compl."). SA–TECH appended three exhibits to its motion for judgment on the administrative record: an affidavit, one of its filings in Kratos's GAO protest, and a slide presentation. Its GAO protest filing is already included in the administrative record. *See* AR 1669–88. The court did not consider the other two exhibits because they were not included in the administrative record and were unnecessary for the court's review of the protest. *See* *Axiom Res. Mgmt., Inc. v. United States,* 564 F.3d 1374, 1381 (Fed.Cir.2009) ("The focus of judicial review of agency action remains the administrative record, which should be supplemented only if the existing record is insufficient to permit meaningful review consistent with the [Administrative Procedure Act].").

3 The administrative record does not contain the portion of the Final Evaluation Report that addresses [...] final proposal revision.

4 The Source Selection Authority considered these comments under the Management Approach element in her source selection decision.

5 The Source Selection Authority did not report any ratings for the Technical/ Management factor overall.

6 As noted above, SA–TECH ultimately received a "satisfactory" rating on this element in the Source Selection Decision Memorandum.

7 During oral argument, defense counsel reaffirmed the Army's intention to take the corrective action that it described in its letter to the GAO and that caused the GAO to dismiss Kratos's protest.

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8 Prior to 1982, the predecessor of the Court of Federal Claims exercised jurisdiction over preaward bid protests under the Tucker Act's waiver of sovereign immunity for claims based on implied contracts with the United States. *Res. Conservation Grp., LLC v. United States,* 597 F.3d 1238, 1242 (Fed.Cir.2010); *Impresa Construzioni Geom. Domenico Garufi v. United States,* 238 F.3d 1324, 1331 (Fed.Cir.2001). Relief was limited to money damages. *Impresa Construzioni Geom. Domenico Garufi,* 238 F.3d at 1331. The court's ability to grant declaratory and injunctive relief in preaward bid protests was added to the Tucker Act in section 133 of the Federal Courts Improvement Act of 1982, Pub.L. No. 97–164, 96 Stat. 25, 39–40. Jurisdiction over postaward bid protests was added to the Tucker Act in section 12 of the Administrative Dispute Resolution Act of 1996 ("ADRA"), Pub.L. No. 104–320, 1110 Stat. 3870, 3874–76.

9 *See, e.g., Turner Constr. Co. v. United States,* 645 F.3d 1377 (2011); *Centech Grp., Inc. v. United States,* 554 F.3d 1029 (Fed.Cir.2009); *Chapman Law Firm Co. v. Greenleaf Constr. Co.,* 490 F.3d 934 (Fed.Cir.2007); *Roxco, Ltd. v. United States,* 185 F.3d 886 (Fed.Cir.1999) (unpublished table decision); *Jacobs Tech. Inc. v. United States,* 100 Fed.Cl. 186 (2011) (merits), 100 Fed.Cl. 173 (2011) (jurisdiction); *Sheridan Corp. v. United States,* 95 Fed.Cl. 141 (2010); *Turner Constr. Co. v. United States,* 94 Fed.Cl. 561 (2010), *aff'd,* 645 F.3d 1377; *Ceres Gulf, Inc. v. United States,* 94 Fed.Cl. 303 (2010); *Centech Grp., Inc. v. United States,* 79 Fed.Cl. 562 (2007) (merits), *aff'd,* 554 F.3d at 1029; *Centech Grp., Inc. v. United States,* 78 Fed.Cl. 496 (2007) (jurisdiction); *Chapman Law Firm Co. v. United States,* 71 Fed.Cl. 124 (2006), *aff'd in part, rev'd in part sub nom.* 490 F.3d at 934; *MCII Generator & Electric, Inc. v. United States,* No. 1:02–CV–00085–LMB, 2002 WL 32126244 (Fed.Cl. Mar. 18, 2002); *Griffy's Landscape Maint. LLC v. United States,* 51 Fed.Cl. 667 (2001); *Cal. Marine Cleaning, Inc. v. United States,* 42 Fed.Cl. 281 (1998).

10 Two of these protests predate the 1996 enactment of the ADRA. *See Firth Constr. Co. v. United States,* 36 Fed.Cl. 268 (1996); *IMS Servs., Inc. v. United States,* 32 Fed.Cl. 388 (1994). As noted above, prior to the enactment of the ADRA, the Tucker Act's waiver of sovereign immunity for suits against the United States based on express or implied contracts was construed "to authorize suits by disappointed bidders challenging contract awards based on alleged improprieties in the procurement process." *Res. Conservation Grp., LLC,* 597 F.3d at 1242. The ADRA amended the Tucker Act—deleting the language concerning the relief available in preaward bid protests and adding language addressing both preaward and postaward bid protests—to establish the bid protest jurisdiction of the Court of Federal Claims in its current form. *See* § 12(a), 1110 Stat. at 3874–76. Due to the significant change in statutory language, *Firth Construction Co.* and *IMS Services, Inc.* provide little guidance as to the court's current bid protest jurisdiction. Nevertheless, these decisions reflect the fact that the Court of Federal Claims exercised jurisdiction over challenges to proposed, but not implemented, corrective action even under a more restrictive jurisdictional provision.

11 *See, e.g., ManTech Telecomms. & Info. Sys. Corp. v. United States,* 30 Fed.Appx. 995 (Fed.Cir.2002) (unpublished per curiam decision); *Madison Servs., Inc. v. United States,* 90 Fed.Cl. 673 (2010) (dismissing intended awardee's initial claims as unripe and moot but making no ruling on subject matter jurisdiction under 28 U.S.C. § 1491(b)(1), and permitting intended awardee to pursue supplemental claims); *Aeolus Sys., LLC v. United States,* 79 Fed.Cl. 1 (2007); *Delaney Constr. Corp. v. United States,* 56 Fed.Cl. 470 (2003); *ManTech Telecomms. & Info. Sys. Corp. v. United States,* 49 Fed.Cl. 57 (2001), *aff'd per curiam,* 30 Fed.Appx. at 995.

12 For a discussion of the bid protest jurisdiction exercised by the federal courts before the enactment of the ADRA, *see Emery Worldwide Airlines, Inc. v. United States,* 264 F.3d 1071, 1083 n. 11 (Fed.Cir.2001).

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13 The provision concerning 28 U.S.C. § 1491 discussed in the conference report was ultimately enacted in an amended form that gave federal district courts and the Court of Federal Claims concurrent jurisdiction over bid protests for four years, after which time the Court of Federal Claims, in the absence of congressional action, would have exclusive jurisdiction. *See* 142 Cong. Rec. S11848 (daily ed. Sept. 30, 1996) (containing the text of the amendment to 28 U.S.C. § 1491 that was ultimately enacted).

14 Congress created the Court of Federal Claims under Article I of the United States Constitution. 28 U.S.C. § 171(a). Courts established under Article I are not bound by the "case or controversy" requirement of Article III. *Zevalkink v. Brown,* 102 F.3d 1236, 1243 (Fed.Cir.1996). However, the Court of Federal Claims and other Article I courts traditionally have applied the "case or controversy" justiciability doctrines in their cases for prudential reasons. *See id.; CW Gov't Travel, Inc. v. United States,* 46 Fed.Cl. 554, 558 (2000); *see also Anderson v. United States,* 344 F.3d 1343, 1350 n. 1 (Fed.Cir.2003) ("The Court of Federal Claims ... applies the same standing requirements enforced by other federal courts created under Article III.").

15 A protester must also demonstrate prejudice to succeed on the merits of its bid protest. *See Data Gen. Corp. v. Johnson,* 78 F.3d 1556, 1562 (Fed.Cir.1996) ("[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it."). The test for demonstrating prejudice at both the standing and merits stages of the protest is the same, but application of the test may yield different results due to the differing standards of review. *See L–3 Commc'ns Corp. v. United States,* 99 Fed.Cl. 283, 289 (2011) ("The difference between the two [prejudice standards] is that the prejudice determination for purposes of standing assumes all non-frivolous allegations to be true, whereas the post-merits prejudice determination is based only on those allegations which have been proven true."); *Tech Sys., Inc. v. United States,* 98 Fed.Cl. 228, 244 (2011) ("[S]ince, for purposes of standing, prejudice must be analyzed *before* a merits determination is made, it is more properly considered as a question of potential rather than actual prejudice, and assessed based on the cumulative impact of the well-pled allegations of agency error (which are assumed true at this juncture of proceedings).").

16 Kratos argues that one of SA–TECH's contentions—the impropriety of the Army's decision to amend the RFP—is not ripe for review. Because this argument is encompassed by the more general argument advanced by the United States that SA–TECH's challenge to the Army's proposed corrective action is unripe in its entirety, the court will not address it separately.

17 During oral argument, in response to the court's inquiry regarding whether the Army still intended to take its proposed corrective action, defense counsel stated that he had conferred with his client on this issue and that the Army indicated that it would proceed with the corrective action as proposed. Counsel then turned to Tina Pixler, the Army attorney who signed the April 22, 2011 letter and who was present at oral argument, for confirmation. Ms. Pixler nodded her head in agreement.

18 *Madison Services, Inc.,* relied upon by the United States, is distinguishable. In that case, counsel for the protester, the intended contract awardee, alleged that counsel for the procuring agency "notified" the protester "that a decision had been made to follow the GAO recommendation" set forth in the GAO's decision sustaining the protest of an unsuccessful offeror. 90 Fed.Cl. at 676 (internal quotation marks omitted). There was no indication that the agency formally notified the GAO that it intended to take corrective action. *Id.* at 679. Thus, there remained the possibility that the agency would "reconsider its tentative decision" and choose to take a different path. *Id.* In this case, in contrast, the Army formally represented that it would take corrective action and it cannot revisit its decision without calling into question the GAO's dismissal of Kratos's protest at its request.

19 The decision in *Bannum* was based upon then-RCFC 56.1, which was abrogated and replaced by RCFC 52.1. RCFC 52.1 was designed to incorporate the decision in *Bannum. See* RCFC 52.1, Rules Committee Note (June 20, 2006).

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20 It is worth noting that during oral argument, SA–TECH's counsel indicated that once SA–TECH was awarded the contract, the incumbent personnel offered positions with SA–TECH accepted those positions, thus vindicating the rationality of, and the Source Selection Authority's reasonable reliance on, its mitigation plan. Because this fact was not part of the administrative record, however, the court did not consider it in rendering its decision.

21 The United States contends that the court must apply a different standard: that so long as the Army decided to take corrective action in good faith, the court must uphold the decision. In support of this standard, the United States cites four decisions of the Court of Federal Claims. *See* Def.'s Mot. 20 (citing *Ceres Gulf, Inc.,* 94 Fed.Cl. at 318; *Metro. Van & Storage, Inc. v. United States,* 92 Fed.Cl. 232, 252–53 (2010); *Seaborn Health Care, Inc. v. United States,* 55 Fed.Cl. 520, 527 (2003); *Griffy's Landscape Maint. LLC,* 51 Fed.Cl. at 675). Reliance on these decisions, however, is problematic. As an initial matter, neither *Metropolitan Van & Storage, Inc.* nor *Griffy's Landscape Maintenance LLC* sets forth the good faith standard advanced by the United States. They merely stand for the proposition that a procuring agency has broad discretion to decide whether corrective action is appropriate and the court should not substitute its judgment for that of the agency if the decision to take corrective action was reasonable.

The origin of the good faith standard discussed in the remaining decisions sheds doubt on its usefulness in the Court of Federal Claims. The court in *Ceres Gulf, Inc.* quotes *Seaborn Health Care, Inc.,* for the proposition that "[w]here 'a decision to amend a solicitation and request revised offers is made in good faith, without the intent to change a particular offeror's ranking or to avoid an award to a particular offeror, that decision will not be disturbed.' " 94 Fed.Cl. at 318. The court in *Seaborn Health Care, Inc.* cites *ManTech Telecommunications & Information Systems Corp.*, which, in turn, quotes a decision from the GAO:

> [T]he GAO has repeatedly held that "[a]n agency may amend a solicitation, and request and evaluate another rounds of [best-and-final offers] where the record shows that the agency made the decision to take this action in good faith, without the specific intent of changing a particular offeror's technical ranking or avoiding an award to a particular offeror."

49 Fed.Cl. at 73 (quoting *Fed. Sec. Sys., Inc.,* B–281745.2, 99–1 CPD ¶ 86 (Comp.Gen. Apr. 29, 1999)). The GAO, however, applies a different standard of review to bid protests than does the Court of Federal Claims. While the GAO is charged with determining whether a procuring agency has violated a statute or regulation, 31 U.S.C. § 3554(b)(1); 4 C.F.R. § 21.8(a), the Court of Federal Claims must determine whether the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. An agency acting in good faith may still violate this standard. *See* *Impresa Construzioni Geom. Domenico Garufi,* 238 F.3d at 1333 (noting that 28 U.S.C. § 1491, as amended by the ADRA, requires the application of "the [Administrative Procedure Act] standard of review which is not limited to fraud or bad faith by the contracting officer," and that "bad faith on the part of the procuring official is only one of several criteria which may trigger judicial review of a contracting officer's decision"); *Keco Indus., Inc. v. United States,* 492 F.2d 1200, 1203–04 (Ct.Cl.1974) (noting that a procuring agency's action may be held to be arbitrary and capricious if there was "subjective bad faith on the part of the procuring officials," no reasonable basis for the decision, or a violation of statute or regulation—implying that bad faith and lack of a rational basis are separate grounds for recovery). Thus, the court will not apply the standard advocated by the United States.

22 SA–TECH also requests an injunction preventing the Army from implementing any other corrective action in response to Kratos's GAO protest. Such an injunction would be overbroad. For one, there is no evidence in the administrative record that the Army believes another course of corrective action would be appropriate; it would therefore be mere speculation that the Army would attempt to craft another plan. Additionally, the court has held, as the basis for finding the Army's proposed corrective action arbitrary, capricious, and an abuse of discretion, that the grounds of Kratos's GAO protest were meritless. Thus, any future plan of corrective action based on those grounds would contravene the court's holding.

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23 The disclosure of SA–TECH's price in the award notification letters, standing alone, does not constitute irreparable harm. The government is required to disclose the price of an awarded contract to the unsuccessful offerors. *See* FAR 15.503(b)(1) (requiring the procuring agency to provide unsuccessful offerors with a notice that includes "[t]he items, quantities, and any stated unit prices of each award"); FAR 15.506(d) (requiring the procuring agency to disclose "[t]he overall evaluated cost or price ... of the successful offeror" during postaward debriefings). As the United States notes, if such disclosure constituted irreparable harm, the government would be hampered in its attempts to take corrective action to cure legitimate deficiencies unearthed during bid protests. *See also Griffy's Landscape Maint. LLC,* 51 Fed.Cl. at 675 (noting that the "price bids were disclosed by operation of law" and that "[i]n the context of pre-award negotiations the contracting officer is given latitude in deciding whether to cancel a solicitation and request new bids after price offers have been disclosed"); *DGS Contract Serv., Inc. v. United States,* 43 Fed.Cl. 227, 238 (1999) ("[W]hen an unsuccessful offeror lawfully obtains source selection information, such as a competitor ['s] prices and technical scores, and the agency subsequently properly reopens negotiations, the agency may disclose similar information to all the competitors to eliminate any competitive advantage obtained.").

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COMPTROLLER GENERAL

Matter of: Deloitte Consulting, LLP

DOCUMENT FOR PUBLIC RELEASE The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

November 28, 2016

***1** David S. Cohen, Esq., John J. O'Brien, Esq., Laurel A. Hockey, Esq., Amy J. Spencer, Esq., and Daniel Strouse, Esq., Cohen Mohr LLP, for the protester.
Thomas K. David, Esq., Kenneth D. Brody, Esq., and Katherine A. David, Esq., David, Brody & Dondershine, LLP, for Data Networks Corporation, an intervenor.
David R. Smith, Esq., and Randy Stone, Esq., Department of Defense, Defense Health Agency, for the agency.

Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where, in response to a prior protest, agency took corrective action by engaging in discussions, but imposed unreasonably restrictive limitations on the scope of proposal revisions, which prohibit revision of proposal information materially impacted by the corrective action.

DECISION

Deloitte Consulting, LLP, of Arlington, Virginia, protests the actions of the Department of Defense, Defense Health Agency (DHA) in its implementation of corrective action in response to Deloitte's prior protest of the award of a contract to Data Networks Corporation (DNC), of Reston, Virginia, under request for proposals (RFP) No. HT0011–15–R–0010, for the agency's governance, requirements, and architecture management support (GRAMS) requirement. Deloitte alleges that the agency has imposed unreasonable limitations on the scope of final proposal revisions (FPRs), by prohibiting revisions in areas of proposals that are materially impacted by the corrective action.

We sustain the protest.

BACKGROUND

The agency issued the RFP on February 26, 2015, for the purpose of awarding a contract for the GRAMS requirement, which provides program management support to requirement managers in DHA's Health Information Technology Directorate. The RFP provided that the GRAMS contract was to be awarded on a best-value basis, for a one-year base period and four one-year option periods. The best-value decision was to be based on four evaluation factors and subfactors, as follows:

1. Factor 1-Technical
   Subfactor 1A-Technical Approach
   Subfactor 1B-Staffing Approach
   Subfactor 1C-Transition In and Out

Subfactor 1D-Quality Control Approach
2. Factor 2-Past Performance
3. Factor 3-Small Business Participation Plan (acceptable/unacceptable)
4. Factor 4-Price

RFP Amendment 004, at 61. As relevant, the RFP performance work statement identified nine key personnel positions and the minimum requirements for those positions. *Id.* at 130–131. The RFP provided that the key personnel resumes and commitment letters would be evaluated under "Subfactor 1B-Staffing Approach," in order to determine the "[r]elevant qualifications and experience of proposed Key Personnel." *Id.* at 62.

***2** Six offerors submitted proposals in response to the RFP. Following an initial evaluation, discussions, and evaluation of FPRs, the agency made an initial award to DNC on September 17, 2015. Deloitte protested that award decision with our Office, alleging in part that DNC had unmitigable impaired objectivity organizational conflicts of interest (OCIs) due to two other contracts held by DNC. In response to Deloitte's protest, the agency informed our Office that it would take corrective action and conduct a new OCI analysis concerning DNC's contracts. Our Office then dismissed Deloitte's protest as academic on October 26. *Deloitte Consulting, LLP,* B–412125, Oct. 26, 2015 (unpublished decision).

The agency completed a new OCI analysis memorandum dated December 14, which concluded that the connections between DNC's contracts did not present an OCI. OCI Analysis Memo, at 6. The agency reaffirmed the prior award to DNC on December 31. Deloitte then filed its second protest of the award decision on January 6, 2016, alleging that the agency's new OCI analysis was unreasonable. Deloitte also alleged that the agency's evaluations of the staffing approach subfactor and the past performance factor were unreasonable, and that the agency conducted unequal discussions with respect to past performance.

On April 15, 2016, we sustained the protest in part, finding that the agency conducted an unreasonable evaluation of the key personnel resumes under the staffing approach subfactor. *Deloitte Consulting, LLP,* B–412125.2, B–412125.3, Apr. 15, 2016, 2016 CPD ¶119. Specifically, we concluded that the resumes of multiple key personnel did not demonstrate that the individuals met the minimum requirements of the positions for which they were proposed, and that to the extent certain minimum requirements had been waived by the agency, we could not conclude that the waiver was equally applied to both offerors' proposed personnel. *Id.*

We also sustained the protest on the basis that the agency's evaluation of past performance was unreasonable and unsupported, and that the agency's discussions with the offerors in this area were unequal. *Id.* We denied the protest with respect to Deloitte's challenge to the agency's OCI analysis. *Id.* We recommended that the agency reopen discussions with the offerors, request new FPRs, and conduct and document a new evaluation in accordance with the evaluation criteria of the RFP. *Id.* We also specifically noted that the agency's discussions should include evaluation notices concerning any proposed key personnel whose resume did not meet the minimum requirements of the RFP. *Id.*

***3** On April 29, the agency advised Deloitte of its planned corrective action in the following notice:

> Please be advised that the Defense Health Agency intends to take corrective action in this case, consistent with the GAO's recommendations following the sustained protest. The Agency corrective action will include conducting discussions regarding past performance and key personnel with offerors in the competitive range, permitting offerors to submit final proposal revisions (FPRs) limited to past performance and key personnel information, reevaluating the offerors' past performance and key personnel information, and making a new source selection decision. The Agency expects to execute this corrective action within the next several days.

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Request to Dismiss Protest B–412125.4, May 24, 2016, at 1–2. On May 4 and May 5, the agency and protester exchanged further correspondence, in which the agency indicated that the "description of the scope of the Agency's intended corrective action is accurate-we will limit FPR updates to past performance and key personnel information," and that "[t]he agency will only be reevaluating past performance and key personnel information and does not intend to request revised price proposals from the offerors in the competitive range." *Id.* at 2.

By email on May 16, the agency sent Deloitte evaluation notices and a cover letter that further explained the discussions process and final FPR limitations. The evaluation notices (ENs) concerning Deloitte's key personnel advised that on reevaluation, the agency was unable to confirm that [DELETED] of Deloitte's nine key personnel met the minimum requirements of the positions for which they were proposed. In the cover letter, the agency advised that it was reopening discussions "ONLY in the areas specifically related to Sub-factor 1B Key Personnel and Past Performance," and that FPRs could update proposals "ONLY in the areas addressed in the enclosed EN." Protest B–412125.4, May 20, 2016, at 9.

In response to the cover letter, Deloitte again contacted the agency to clarify the restrictions on FPRs. Specifically, Deloitte advised the agency that changes to its "key personnel information" in response to the agency's ENs would require replacement of [DELETED] previously-proposed key personnel, and would necessitate key personnel-related revisions to all technical subfactors-not simply the key personnel area of subfactor 1B. Deloitte explained that this was because the key personnel to be replaced had also been specifically identified in other areas of Deloitte's technical proposal, and because the replacement of these personnel otherwise impacted Deloitte's proposed approach such that it will cause a ripple effect throughout the technical proposal. Accordingly, Deloitte requested that the agency confirm its intention to evaluate updated key personnel-related information throughout the revised technical proposal.

***4** By email on May 17, the agency advised that "the process will remain as stated in the letter ... dated May 16, 2016." Protest B–412125.4, May 20, 2016, at 10. Deloitte then filed its first protest of the agency's conduct of the corrective action on May 20. [1]

On August 11, the GAO attorney handling the protest conducted an alternative dispute resolution, negotiation assistance, conference call with the parties. The GAO attorney attempted to clarify the scope of Deloitte's request to revise "key personnel information" throughout its technical proposal, as well as the basis for the agency's opposition to those revisions, to assess the possibility of a mutually satisfactory resolution of the protest. During that call, the GAO attorney expressed concern with the agency's restrictions on revisions to FPRs to the extent that the restrictions would prevent an offeror from revising all references to specific key personnel to be replaced, thereby creating potentially material inconsistencies within the offeror's revised proposal. Following this conference call, on August 12, the agency advised our Office that it would take corrective action consisting of revising the FPR instructions. Our Office then dismissed Deloitte's protest on August 16. *Deloitte Consulting LLP,* B–412125.4, Aug. 16, 2016 (unpublished decision).

As a result of this corrective action, the agency updated its restrictions on FPRs as follows:

> (1)You may make written changes to Volume 1, Key Personnel, *under Technical Subfactor 1B,* and (2) you may make written changes to other aspects of your Technical Proposal (under Subfactors 1A, 1C, and 1D), *but only to the extent* that your initial proposal referenced your key personnel and/or the qualifications of said key personnel relative to their ability to execute your proposed technical approach. More specifically, the scope of changes to your Technical Proposal outside of Technical Subfactor 1B is limited to updating the names of key personnel (as necessary) and updating any accompanying qualification descriptions for such new key personnel. You may *not* update your technical approach under Subfactors 1A, 1C, or 1D.

Corrective Action Letter, August 12, 2016, at 1 (emphasis original).

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On August 22, Deloitte filed the instant protest.

DISCUSSION

Deloitte argues that the agency's updated FPR instructions continue to exclude proposal revisions "inextricably linked" to the key personnel substitutions permitted in response to discussions. [2] Deloitte specifically asserts that the limitations, for example, improperly prohibit necessary revisions to its transition plan and unreasonably restrict the specific content of proposal updates in areas where revisions are permitted.

The agency responds that its limitations on the scope of FPR revisions are reasonable and tailored to remedy the identified procurement improprieties in our Office's April 15, 2016 decision sustaining Deloitte's prior protest in part, and are consistent with GAO precedent regarding agency discretion to limit proposal revisions in the context of corrective actions. The agency contends that Deloitte aims to update multiple aspects of its technical approach by using new key personnel to introduce new tools and techniques not presented in its prior proposal, and to alter its transition approach. According to the agency, Deloitte should not be "allowed to augment its technical approach at this late stage, thereby disregarding a reasonable corrective action tailored to correct a procurement impropriety." Agency Report (AR) at 7.

***5** An agency's discretion when taking corrective action extends to the scope of proposal revisions. *See*, *e.g.*, *Computer Assocs. Int'l.*, B–292077.2, Sept. 4, 2003, 2003 CPD ¶157 at 5; *Rel–Tek Sys. & Design, Inc.--Modification of Remedy*, B–280463.7, July 1, 1999, 99–2 CPD ¶1 at 3. As a general matter, offerors in response to discussions may revise any aspect of their proposals as they see fit, including portions of their proposals which were not subject to discussions; an agency, in conducting discussions to implement corrective action, may, however, reasonably limit the scope of revisions. *System Planning Corp.*, B–244697.4, June 15, 1992, 92–1 CPD ¶516 at 3–4. Where the corrective action does not also include amending the solicitation, we will not question an agency's decision to restrict proposal revisions when taking corrective action so long as it is reasonable in nature and remedies the established or suspected procurement impropriety. *See*, *Consolidated Eng'g Servs., Inc.*, B–293864.2, Oct. 25, 2004, 2004 CPD ¶214 at 3–4; *Computer Assocs. Int'l*, *supra*. In reviewing the reasonableness of an agency's restrictions on proposal revisions in the context of discussions to implement corrective action, we will consider whether the discussions, and permitted revisions in response to discussions, are expected to have a material impact on other areas of the offeror's proposal. *Evergreen Helicopters of Alaska*, *Inc.*, B–409327.3, Apr. 14, 2014, 2014 CPD ¶128 at 8; *Honeywell Technology Solutions, Inc.*, B–400771.6, Nov. 23, 2009, 2009 CPD ¶240 at 4; *see also Rel–Tek Sys. & Design, Inc.--Modification of Remedy*, *supra.*; *ST Aerospace Engines Pte. Ltd.*, B–275725.3 Oct. 17, 1997, 97–2 CPD ¶106 at 4.

We have reviewed the record here and, as a general matter, do not object to the agency's decision to limit proposal revisions to areas in which our Office identified improprieties in the prior award decision. However, even where an agency is justified in restricting discussions responses in corrective action, the agency may not prohibit offerors from revising related areas of their proposals which are materially impacted. Whether these associated revisions may allow an offeror to further "augment its technical approach,"-as the agency asserts is Deloitte's intention-is not the appropriate test of whether such revisions must be permitted. Rather, as set forth above, when assessing the reasonableness of an agency's restrictions on proposal revisions, we consider the extent to which the discussions, and the permitted changes in response to discussions, materially impact or are "inextricably linked" with other aspects of an offeror's proposal. *Honeywell Technology Solutions, Inc., supra.*

***6** In multiple prior protests concerning agency decisions to limit the scope of proposal revisions as part of corrective action, our Office has concluded that the limitations imposed were reasonable. In each of these cases, we concluded that the permitted revisions in response to discussions would not impact other areas of the proposals in which revisions were prohibited. For instance, in *Evergreen Helicopters*, our Office did not object to corrective action that limited FPR revisions to the addition of "performance data charts for the aircraft type and tail numbers proposed," and prohibited any other revisions. *Evergreen Helicopters of Alaska, Inc.*, *supra*. at 3. We concluded that the limited revisions were reasonable to correct informational deficiencies in the proposals, that other aspects of the proposals such as pricing would not be impacted by discussions limited

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to additional performance data, and that correction of informational deficiencies with respect to previously-proposed aircraft, therefore, need not open the door for offerors to substitute entirely new aircraft.

Similarly, in *Honeywell Technology Solutions, Inc., supra,* our Office did not object to corrective action where the agency allowed offerors to revise their past performance proposals only. In that case, we found that the limited revisions were reasonable to correct evaluation errors associated with two prior past performance evaluations. Concerning the protester's argument that the FPR limitations were unreasonably restrictive where other aspects of its proposal were "inextricably linked" to its past performance information, we disagreed, concluding that "Honeywell has failed to establish that NASA's decision permitting offerors to update their past performance information is expected to have a material impact on their cost or technical proposals."[3] *Id.* at 3, 5.

Finally, in *Rel–Tek Sys. & Design, Inc.-Modification of Remedy, supra,* we did not object to corrective action which limited proposal revisions to three specific solicitation requirements, concerning "acceptance, warranty and software performance provisions" of the solicitation. *Id.* at 2. In that protest, Rel–Tek argued that the corrective action was improper because it precluded Rel–Tek from changing areas of its proposal that the firm desired to change in order to be more competitive. Our Office concluded that the procurement improprieties and the corrective action involved separate aspects of the firm's proposal and did not affect other portions of the proposal or requirements. We also specifically noted, however, that the limitations imposed by the agency did not prohibit the protester from revising other aspects of its proposal to the extent they related to the acceptance, warranty, and software performance provisions. Our decision indicated as follows:

> ***7** To the extent Rel–Tek contends that the limited [best and final offer (BAFO)] request prejudices its chances for award, since the firm cannot alter its cost proposal in other areas that may have included costs related to these three [solicitation] requirements, we are not persuaded by this argument-Rel-Tek has not shown that the terms of the BAFO request are unnecessarily restrictive. The agency's BAFO request, limited to the offerors' technical and cost-related proposal revisions for acceptance, warranty, and system performance, *did not prohibit revision to other areas of the offerors' proposals to the extent that those proposal areas contained terms and related costs for the three requirements at issue*

Id., at 4 n.5 (emphasis added).[4]

In contrast, in the present protest, we conclude that the corrective action, to include discussions regarding key personnel, does materially impact the protester's technical proposal beyond the limited revisions permitted in the agency's updated FPR instructions letter. On the record here, the protester has established that the permitted key personnel substitutions broadly impact its proposal due to the differing qualifications, capabilities, and experience of the key personnel substitutions, and their relative ability to perform the proposal as initially proposed. Where the agency's limitations on proposal revision prohibit such changes, they are unreasonable.

For example, we agree with the protester that the FPR instructions, as written, unreasonably prohibit the protester from revising its transition plan, which is materially impacted by the permitted key personnel substitutions. Specifically, the FPR instructions permit revisions to proposal sections beyond those of subfactor 1B "only to the extent that your initial proposal referenced your key personnel." Corrective Action Letter, August 12, 2016, at 1. While Deloitte's transition plan, as proposed, did not directly address the transition of key personnel, Deloitte explains that its transition must nonetheless be revised because while its previously-proposed key personnel were all [DELETED] its substitute key personnel are [DELETED]. As a consequence, these new key personnel [DELETED]. Given that the agency's proposal revision instructions preclude this change to a section of Deloitte's proposal that would be materially impacted by the permitted key personnel substitutions, we conclude that the instruction's limitations are unreasonably restrictive.

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We also agree with the protester that the instruction limiting the contents of revisions to "updating the names of key personnel (as necessary) and updating any accompanying qualification descriptions for such new key personnel" unreasonably restricts the protester from conforming areas of its technical proposal that directly reference key personnel who will be removed. For example, Deloitte explains, and the record reflects, that its prior proposal identified two key personnel-its program manager and senior information architect (architecture)-as also performing in non-key roles as [DELETED] in its transition approach. Deloitte argues that these two individuals were selected based on prior experience [DELETED]. Both individuals are now to be replaced in Deloitte's FPR. Because Deloitte's new senior information architect (architecture) does not have experience [DELETED], Deloitte proposes to replace its [DELETED] with an individual who will not be designated as a key person-a substitution which would be prohibited under a plain reading of the agency's limitations on revisions since the new individual is not one of the "key personnel." [5]

***8** Finally, we agree with the protester that the agency's decision to limit proposal updates to "accompanying qualification descriptions" is unreasonably restrictive with respect to other skills and attributes of the key personnel that Deloitte highlighted throughout its technical proposal. Specifically, Deloitte explains that because the substitute key personnel do not share the same skills and experience which led Deloitte to feature the prior key personnel in the other areas of its technical approach, those aspects of the approach also require revision. In essence, Deloitte maintains that the required substitutions necessitate changes to its technical proposal beyond merely changing the qualification descriptions of the new key personnel.

For example, Deloitte's prior proposal presented multiple descriptions of its key personnel's knowledge of various management practices and techniques, which were presented as enhancements to, and impact its approach to performance of, technical subfactors outside of subfactor 1B. Because Deloitte's substitute key personnel have different skills and experience-with different [DELETED], for instance [6] -we agree that the permitted revisions should extend to revising references to substituted key personnel in Deloitte's technical approach as necessary to reflect the skills of its new personnel, or to otherwise address the proposal content impacted by the removal of the prior key personnel.

In conclusion, we find that the restrictions on proposal revisions imposed by the agency in connection with key personnel substitutions, as part of the agency's implementation of corrective action, are unreasonably restrictive. The protester has demonstrated that due to the inherently different qualifications, capabilities, and experience of key personnel, substitutions with respect to these individuals materially impact the protester's proposal in a broad manner, in ways that need to be revised beyond merely substituting names and resumes for the individuals to be replaced.

RECOMMENDATION

We find that the agency's limitations on the scope of revisions in response to corrective action are unreasonably restrictive, where the limitations prohibit the protester from revising all aspects of its technical approach that are materially impacted by the corrective action. We recommend that DHA, at a minimum, amend its FPR instruction to permit offerors to revise all aspects of their technical proposals to the extent that the revisions relate to the permitted substitutions of key personnel, and thereafter reevaluate the offerors' revised technical proposals. [7] We also recommend that Deloitte be reimbursed the costs of filing and pursuing its protest, including reasonable attorney's fees. 4 C.F.R. §21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly with the agency within 60 days of receiving this decision. 4 C.F.R. §21.8(f)(1).

***9** The protest is sustained.

Susan A. Poling
General Counsel

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Footnotes

1 The agency requested that our Office dismiss Deloitte's protest as untimely, arguing that Deloitte knew or should have known the basis of its protest no later than May 5. We disagreed, concluding that while Deloitte had been advised that revisions would be limited to "key personnel information," the protester first learned that revisions to key personnel information would be limited to subfactor 1B in the May 16 cover letter. GAO Email on Request for Dismissal, June 15, 2016.

2 Deloitte also alleges that the corrective action letter is ambiguous with respect to the "qualifications" of key personnel that may be revised. Based on our conclusion, below, that the restriction on revisions to only the "qualifications" of key personnel is unreasonably restrictive and our recommendation that the FPR instructions be revised, we conclude that this basis of Deloitte's protest is academic.

3 We reached a different result in the protest of *Power Connector, Inc.,* B–404916.2, Aug. 15, 2011, 2011 CPD ¶186, in which we concluded that offerors should be permitted to make revisions to all aspects of their proposals in response to corrective action concerning an impropriety in the evaluation of past performance. However, the corrective action in that case included the issuance of an amendment to the solicitation. Where an agency amends the solicitation and permits offerors to revise their proposals, our Office has held that offerors should be permitted to revise any aspect of their proposals-including those that were not the subject of the amendment-unless the agency demonstrates that the amendment could not reasonably have an effect on the other aspects of the proposals, or that allowing such revisions would have a detrimental impact on the competitive process. *Power Connector, Inc., supra; Cooperativa Muratori Riuniti,* B–294980.5, July 27, 2005, 2005 CPD ¶144 at 7; *Lockheed Martin Sys. Integration–Owego; Sikorsky Aircraft Co.,* B–299145.5, B–299145.6, Aug. 30, 2007, 2007 CPD ¶155 at 5.

4 We conclude that this fact alone-that the agency in *Rel–Tek* expressed a limitation on the topical "areas" of proposals which could be revised, without limitation to where in the proposals the revisions could reach-significantly distinguishes the reasonable limitations described in *Rel–Tek,* from the unreasonable limitations at issue in this protest.

5 In briefing, the agency expressed that it had no objection to the protester's proposed revision of its [DELETED] to include a new non-key individual. However, where a plain reading of the agency's updated FPR instruction would prohibit such a revision, we conclude that we must sustain the protest in this respect.

6 Deloitte explains that its replacements for [DELETED] bring new skills and experience that redefine the prior approach to multiple aspects of performance. For example, Deloitte highlights the new [DELETED] experience with Deloitte's [DELETED] as new and different skills versus the prior key personnel, which impact various areas of the technical approach in which the skills of the prior key personnel were discussed. Protest at 14–15.

7 Concerning the agency's disagreements with the protester over what aspects of the proposal "relate" to the permitted key personnel substitutions-previewed in the agency's report here-we conclude that a ruling on specific proposal revisions is premature at this time. To the extent that the agency declines to review certain revisions undertaken by the protester as "related" to the substitution of key personnel, such a dispute concerns an evaluation challenge that would potentially form the basis of a subsequent protest with this Office.

B- 412125.6 (Comp.Gen.), 2016 CPD P 355, 2016 WL 7228771

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B- 417028.3 (Comp.Gen.), 2019 CPD P 130, 2019 WL 1583001

COMPTROLLER GENERAL

Matter of: NavQSys, LLC

DOCUMENT FOR PUBLIC RELEASE The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

March 27, 2019

***1** Steven J. Koprince, Esq., Ian P. Patterson, Esq., Shane J. McCall, Esq., and Haley E. Claxton, Esq., Koprince Law, LLC, for the protester.
William K. Walker, Esq., for the intervenor, Semper Valens Solutions, Inc.
Wade L. Brown, Esq., Department of the Army, for the agency.

Stephanie B. Magnell, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's corrective action, in which the agency advised our Office of its intent to terminate the award to the current protester and award to the former protester, is sustained because the agency failed to adequately document the basis for its decisions and our Office is unable to conclude that the agency had a reasonable basis for its corrective action.

DECISION

NavQSys, LLC, [1] of Aberdeen Proving Ground, Maryland, protests the corrective action taken by the Department of the Army, Army Materiel Command (AMC), in response to an earlier protest by Semper Valens Solutions, Inc. (Semper Valens), of Canyon Lake, Texas, challenging the Army's award of a contract to NavQSys under request for proposals (RFP) No. W56KGY–17–R–0020, issued by the Department of the Army, Army Contracting Command (ACC)-Aberdeen Proving Ground (APG) on behalf of AMC for systems engineering and technical assistance support. In response to Semper Valens' protest, the Army stated its intent to take corrective action by terminating the contract with NavQSys and awarding the contract to Semper Valens; our Office then dismissed the protest. NavQSys challenges the reasonableness of the agency's corrective action.

We sustain the protest.

BACKGROUND

The RFP was released as a small-business set-aside on July 17, 2017. RFP at 1; Contracting Officer's Statement (COS)/ Memorandum of Law (MOL) at 1. The agency intended to award a cost-plus-fixed-fee contract in accordance with Federal Acquisition Regulation part 15 to the offeror whose proposal represented the best value to the agency, considering the factors of technical, past performance, and cost/price. RFP, Amend. 0001, at 21. The technical factor was significantly more important than past performance, and past performance was significantly more important than cost/price. Also, the non-cost factors, when combined, were significantly more important than the cost/price factor. *Id.* As relevant to this protest, the RFP provided, in part, that in order to respond to the RFP, offerors must have a valid top secret facility clearance. Agency Report (AR), Tab 3, RFP, Attach. 0004 at 3.

On August 11, NavQSys asked the Army for clarity as to whether the facility clearance provision could be satisfied by an “unpopulated” joint venture, if each joint venture member itself held a facility clearance. AR, Tab 8, QED Ltr. to Army at 3.

The agency never responded to NavQSys' inquiry. COS/MOL at 8. On August 23, the Army received five proposals, including those of Semper Valens and NavQSys.

***2** On September 29, 2018, the Army selected NavQSys' proposal as offering the best overall value to the agency. AR, Tab 10, Source Selection Decision. The agency advised Semper Valens of the award to NavQSys on October 2. AR, Tab 11, Award Notice. The Army provided Semper Valens with a debriefing, which was completed on October 16. COS/MOL at 9.

On October 18, Semper Valens filed a protest with our Office challenging the Army's award to NavQSys, arguing that the agency should have disqualified NavQSys for failing to hold a top secret facility clearance at the time of proposal submission. AR, Tab 15, Protest B–417028 at 2.

On December 10, the Army advised our Office that it intended to take corrective action by terminating the contract with NavQSys and making award to Semper Valens. AR, Tab 18, Notice of Corrective Action. We dismissed the protest as academic on the basis of this proposed corrective action. *Semper Valens Sols., Inc.,* B–417028, Dec. 11, 2018 (unpublished decision). This protest followed on December 20.

DISCUSSION

NavQSys argues that the agency's intended corrective action is unreasonable and inadequately documented. Based on alleged conversations between NavQSys and the Army after the dismissal of Semper Valens' protest, NavQSys explains that the Army determined that NavQSys was ineligible for award because the joint venture did not hold its own facility clearance. [2] Protest at 7–8. The Army does not address these alleged conversations, but broadly claims that NavQSys was ineligible to compete for the solicitation and thus its corrective action was reasonable. [3] COS/MOL at 13.

As a general matter, the details of a **corrective action** are within the sound **discretion** and judgment of the contracting agency. *Jacobs Tech., Inc.,* B–416314, B–416314.2, July 31, 2018, 2018 CPD ¶271 at 4; *Rockwell Elec. Commerce Corp.,* B–286201.6, Aug. 30, 2001, 2001 CPD ¶162 at 4. In general, we will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. *Networks Elec. Corp.,* B–290666.3, Sept. 30, 2002, 2002 CPD ¶173 at 3. Where the agency has reasonable concern that there were errors in the procurement, it is within the agency's **discretion** to take **corrective action** where the agency made the decision in good faith. *Jacobs Tech., supra,* at 4.

While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency's conclusions are inconsistent with the solicitation's evaluation criteria, undocumented, or not reasonably based. *See Ekagra Software Techs., Ltd.,* B–415978.3, B–418975.4, Oct. 25, 2018, 2018 CPD ¶377 at 5. Where an agency fails to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its evaluation conclusions. *Id.; see also Navistar Def., LLC, BAE Sys., Tactical Vehicle Sys. LP,* B–401865 *et al.,* Dec. 14, 2009, 2009 CPD ¶258 at 13.

***3** On December 7, during the pendency of Semper Valens' protest, a division chief for ACC APG circulated an internal email containing a status update about the protest, which included the following:

> At this point we feel taking corrective action is our only path forward as the facility clearance solicitation requirement was not met by the awardee. [...] We wanted to get your concurrence on our path forward before legal submits the corrective action plan to AMC/GAO which is due by COB [close of business] Monday. Please advise if you have any questions or concerns.

AR, Tab 23, ACC APG Email, Dec. 7, 2018, at 1.

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On December 10, the agency advised our Office of its intent to take the following corrective action:

(a)terminate for convenience Contract No. W56KGY–18–C–0008 awarded to NavQSys on September 29, 2018; and

(b)award to Semper Valens Solutions, Inc.

AR, Tab 18, B–417028 Notice of Corrective Action at 1.

Because the record provided to our Office contained no further documentation concerning the agency's determination regarding the competitive eligibility of NavQSys, GAO asked the agency to supplement the record with "any other emails, memoranda, or other documents relating to the agency's conclusion that 'the facility clearance solicitation requirement was not met by the awardee.'" GAO Notice to Army, Mar. 13, 2019. The Army "confirm[ed] that the record is complete and that there are no additional documents in response to GAO's attached [GAO] Notice of Request for Documents." Electronic Protest Docket System (EPDS) Docket Entry No. 27.

Here, nothing in the record reflects the agency's apparent determination that award should no longer be made to NavQSys. The agency provided no clear interpretation of the facilities clearance provision nor explained how it applied to NavQSys' proposal. *See, e.g.,* COS/MOL at 8–9 (statement of facts describes no agency determination that NavQSys was ineligible to bid on the solicitation or that its proposal failed to comply with a material solicitation provision). Although the Army claimed that it "will not reevaluate proposals," the agency appears to have reevaluated the facility clearance contained in NavQSys' proposal-without documenting any findings. *Id.* at 14. While the Army maintains that it "determined that NavQSys was not actually eligible to compete" for this procurement, it produced no document containing such analysis. *Id.;* EPDS Docket Entry No. 27.

Because the corrective action reflects a reevaluation of NavQSys, which was not documented, we cannot conclude that the agency had a reasonable basis for its corrective action. [4] Accordingly, we sustain the protest. *OGSys., LLC,* B–417026 *et al.,* Jan. 22, 2019, 2019 CPD ¶66 at 18 (sustaining protest where agency failed to adequately document evaluation); *see also IBM Global Bus. Serv.-U.S. Fed.,* B–409029, B–409029.2, Jan. 27, 2014, 2014 CPD ¶43 at 4 (where agency fails to adequately document its evaluation, our Office cannot determine whether agency's evaluation was reasonable); *Navistar Def., supra,* at 13 (protest sustained where agency could not provide record demonstrating a basis for the evaluation); *Solers, Inc.,* B–404032.3, B–404032.4, Apr. 6, 2011, 2011 CPD 83 at ¶14 (protest sustained where the record does not permit a meaningful review of whether the agency's evaluation was reasonable); *Rockwell Elec. Commerce Corp., supra,* at 4 (challenge to corrective action sustained where agency's corrective action was unreasonable).

Prejudice

***4** The limited record here fails to provide a basis for our Office to review whether the agency reasonably determined that there were errors in the procurement. Our Office will not sustain a protest, however, unless the record establishes a reasonable possibility that the protester was prejudiced by the agency's actions; that is, but for the agency's actions, the protester would have had a substantial chance of receiving the award. *Ekagra Software Techs., supra,* at 11. Here, we cannot say with certainty what the agency's conclusion would have been if it had performed and documented the analysis as to the applicability of the facilities clearance provision to NavQSys. In such circumstances, we resolve doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. *Id.; AT & T Corp.,* B–414886 *et al.,* Oct. 5, 2017, 2017 CPD ¶330 at 8. Accordingly, we conclude that NavQSys has established the requisite competitive prejudice to prevail in its bid protest.

RECOMMENDATION

We recommend that the Army document the basis for its decision to reject the proposal submitted by NavQSys. We also recommend that NavQSys be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4

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C.F.R. §21.8(d)(1). NavQSys should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. §21.8(f)(1).

The protest is sustained. [5]

Thomas H. Armstrong
General Counsel

Footnotes

1 NavQSys is a joint venture comprised of Navigant Systems, LLC, and QED Systems, LLC, and participates in the Small Business Administration's mentor-protégé program.

2 The parties' arguments and the record are inconsistent as to whether the Army determined that NavQSys was ineligible to compete for the contract or whether its proposal was technically unacceptable. *Compare* MOL/COS at 9 (NavQSys' proposal did not "conform to a material term or condition of the solicitation") *with id.* at 13 ("NavQSys was ineligible to bid on this solicitation").

3 The protester raised many other protest grounds. Because we sustain the challenge to the agency's corrective action for lack of adequate documentation, which left our Office with an insufficient record to consider whether the agency had reasonable concerns about the procurement, we do not consider the remaining protest grounds.

4 The posture of this protest is not typical due to the nature of the agency's corrective action. In this regard, the corrective action not only addresses Semper Valens' protest, but also reflects a new agency determination about both NavQSys and Semper Valens. As a result, in this protest challenging the agency's corrective action we are asked to consider the reasonableness of both the corrective action and the new agency determination.

5 To the extent that NavQSys challenges the agency's evaluation of its proposal, those protest grounds are dismissed on the basis that NavQSys, which remains the awardee, is not an interested party to challenge the agency's evaluation. *Aegis Def. Servs., LLC,* B–412755, Mar. 25, 2016, 2016 CPD ¶98 at 7.

B- 417028.3 (Comp.Gen.), 2019 CPD P 130, 2019 WL 1583001

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Not Followed as Dicta Sotera Defense Solutions, Inc. v. United States, Fed.Cl., August 13, 2014

691 F.3d 1374
United States Court of Appeals,
Federal Circuit.

SYSTEMS APPLICATION & TECHNOLOGIES, INC., Plaintiff–Appellee,
v.
UNITED STATES, Defendant–Appellant,
and
Madison Research Corporation, Defendant.

No. 2012–5004.
|
Aug. 24, 2012.

Synopsis

Background: Original contract awardee filed bid protest action challenging proposed corrective action by Army to terminate contract, amend solicitation, accept revised proposals, and make new source selection decision in response to prior bid protest by parent of incumbent contractor. The United States Court of Federal Claims, Margaret M. Sweeney, J., 100 Fed.Cl. 687,granted judgment for plaintiff. Government appealed.

Holdings: The Court of Appeals, Rader, Chief Judge, held that:

[1] Court of Federal Claims had subject matter jurisdiction under Tucker Act over bid protest action;

[2] attempt by awardee to enjoin government from terminating its contract did not transform its otherwise proper protest under Tucker Act into claim which could be adjudicated only under Contract Disputes Act (CDA);

[3] awardee showed non-trivial competitive injury, as required to have standing;

[4] challenge was fit for judicial decision, as required to be ripe; and

[5] awardee had suffered hardship from proposed corrective action, as required to be ripe.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (17)

[1] Federal Courts Jurisdiction

Court of Appeals reviews a decision by the Court of Federal Claims on the legal question of subject matter jurisdiction without deference.

1 Cases that cite this headnote

[2] United States Waiver of Immunity; Consent to Suit

United States Necessity of waiver or consent

Courts have limited jurisdiction to hear and decide suits against the United States due to principles of sovereign immunity; sovereign immunity protects the government from suit except for instances in which the immunity has been unequivocally and expressly waived.

6 Cases that cite this headnote

[3] Public Contracts Judicial Remedies and Review

United States Judicial Remedies and Review

Court of Federal Claims had subject matter jurisdiction under Tucker Act over bid protest action brought by original contract awardee challenging proposed corrective action by Army to terminate contract, amend solicitation, accept revised proposals, and make new source selection decision in response to prior bid protest by parent of incumbent contractor, since awardee objected to solicitation and alleged violations of statutes and regulations governing procurement process, and Tucker Act granted broad jurisdiction over objections to

procurement process. 28 U.S.C.A. § 1491(b)(1).

116 Cases that cite this headnote

[4] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Tucker Act, which expressly waives sovereign immunity for claims against the United States in bid protests, covers a broad range of potential disputes arising during the course of the procurement process; the Court of Federal Claims has jurisdiction over objections to a solicitation, objections to a proposed award, objections to an award, and objections related to a statutory or regulatory violation so long as these objections are in connection with a procurement or proposed procurement. 28 U.S.C.A. § 1491(b)(1).

95 Cases that cite this headnote

[5] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Tucker Act bid protest jurisdiction arises when an agency decides to take corrective action even when such action is not fully implemented. 28 U.S.C.A. § 1491(b)(1).

29 Cases that cite this headnote

[6] **Public Contracts** Decisions of Contracting Officers on Contract Disputes

United States Decisions of Contracting Officers on Contract Disputes

Attempt by original contract awardee to enjoin government from terminating its contract did not transform its otherwise proper protest under Tucker Act into claim which could be adjudicated only under CDA and its concomitant procedural requirements. 28 U.S.C.A. § 1491(b)(1); Contract Disputes Act of 1978, § 3 et seq., 41 U.S.C.A. § 7101 et seq.

5 Cases that cite this headnote

[7] **Injunction** Public Contracts

United States Equitable and nonmonetary relief

A request for injunctive relief regarding the government's termination of a contract concerns the scope of the Court of Federal Claims' equitable powers; it is not an issue of Tucker Act jurisdiction. 28 U.S.C.A. § 1491(b)(1).

1 Cases that cite this headnote

[8] **Public Contracts** Parties; standing

United States Parties; standing

Original contract awardee showed non-trivial competitive injury, as required to have standing under Tucker Act as interested party to challenge proposed corrective action by Army to terminate contract, amend solicitation, accept revised proposals, and make new source selection decision in response to prior bid protest by parent of incumbent contractor, since awardee would have been forced to participate in process second time after its price had been made public. 28 U.S.C.A. § 1491(b)(1).

64 Cases that cite this headnote

[9] **Public Contracts** Parties; standing

United States Parties; standing

In order to have standing under the Tucker Act, a plaintiff in a pre-award protest must show a non-trivial competitive injury which can be addressed by judicial relief, and the plaintiff in post-award protests must show it had a substantial chance of receiving the contract. 28 U.S.C.A. § 1491(b)(1).

40 Cases that cite this headnote

[10] **Public Contracts** Parties; standing

United States Parties; standing

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An arbitrary decision to take corrective action without adequate justification forces a winning contractor to participate in the process a second time and constitutes a competitive injury to that contractor under the Tucker Act. 28 U.S.C.A. § 1491(b)(1).

11 Cases that cite this headnote

[11] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Challenge by original contract awardee to proposed corrective action by Army to terminate contract, amend solicitation, accept revised proposals, and make new source selection decision in response to prior bid protest by parent of incumbent contractor was fit for judicial decision, as required to be ripe for judicial review, since Army declared its decision to engage in corrective action and set in motion several irretrievable legal consequences. 28 U.S.C.A. § 1491(b)(1).

17 Cases that cite this headnote

[12] **Federal Courts** Ripeness; Prematurity

A claim is not ripe for judicial review when it is contingent upon future events that may or may not occur.

10 Cases that cite this headnote

[13] **Administrative Law and Procedure** Ripeness; prematurity

The purpose of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

7 Cases that cite this headnote

[14] **Federal Courts** Fitness and hardship

In assessing ripeness, there are two basic factors: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration.

16 Cases that cite this headnote

[15] **Administrative Law and Procedure** Ripeness; prematurity

When a party challenges government action, the first factor in assessing ripeness becomes a question of whether the challenged conduct constitutes a final agency action.

9 Cases that cite this headnote

[16] **Administrative Law and Procedure** Ripeness; prematurity

When assessing ripeness, final agency action hinges on two points: first, the action must mark the consummation of the agency's decision-making process, i.e., it must not be of a merely tentative or interlocutory nature, and second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

10 Cases that cite this headnote

[17] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Original contract awardee had suffered hardship from proposed corrective action by Army to terminate contract, amend solicitation, accept revised proposals, and make new source selection decision in response to prior bid protest by parent of incumbent contractor, as required for challenge to that decision to be ripe for judicial review, since awardee suffered competitive hardships as result of Army's arbitrary decision to recompete that contract; although awardee would have remedy under CDA if its contract was terminated, possibility of that termination

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still was hardship under ripeness analysis. 28 U.S.C.A. § 1491(b)(1).

11 Cases that cite this headnote

Attorneys and Law Firms

***1377** Craig A. Holman, Arnold & Porter LLP, of Washington, DC, argued for plaintiff-appellee. With him on the brief were Kara L. Daniels and Emma V. Broomfield.

Franklin E. White, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Matthew F. Scarlato, Trail Attorney.

Before RADER, Chief Judge, O'MALLEY and WALLACH, Circuit Judges.

Opinion

RADER, Chief Judge.

In this bid protest action, the United States Court of Federal Claims denied the U.S. Army's motion to dismiss the complaint filed by Systems Application & Technologies, Inc. ("SA–TECH"). SA–TECH, the original contract awardee for aerial target flight and maintenance services, protested the Army's decision to engage in corrective action instead of allowing SA–TECH's award to stand. In addition to asserting subject matter jurisdiction, the Court of Federal Claims also found the Army's actions to be unreasonable and contrary to law. *Sys. Application & Techs., Inc. v. United States,* 100 Fed.Cl. 687, 702–710 (2011). Upon review of the record, this court affirms.

I.

The Court of Federal Claims admirably stated the relevant facts in its opinion. ***1378** *Id.* at 693–702. With that in mind, this court only sets forth the facts required to assess the Army's jurisdictional arguments.

In April 2010, the Army solicited proposals for the provision of aerial target flight operations and maintenance services at numerous Army installations. The solicitation proposed a contract with one base year and four option years. At the time of the solicitation, Kratos Defense & Security Solutions ("Kratos") provided these services under a predecessor contract. *Id.* at 694.

The solicitation listed three evaluation factors: Technical/Management; Past Performance; and Price/Cost. The solicitation indicated that the Army would rate Technical/Management and Past Performance factors and sub-factors as "outstanding," "satisfactory," "marginal," or "unsatisfactory." *Id.* Overall, the Technical/Management and Price/Cost factors were similarly weighted, and, "taken individually, were 'significantly more important' than the Past Performance factor." *Id.* However, the Technical/Management and Past Performance factors, when considered together, were "more important" than the Price/Cost factor. *Id.*

The Technical evaluation factor had three sub-factors, including Labor. The Labor sub-factor required "[e]vidence of the availability of sufficient personnel with the required skills, experience, and of the proposed labor mix to assure effective and efficient performance." J.A. 10270. The solicitation required offerors to provide "[t]he labor mix (i.e. job categories and hours assumed for each) for the SOW [Statement of Work] as a whole," "[m]inimum and proposed levels of education," "resumes for each individual proposed" for specific labor categories, and "the total number of personnel proposed to perform the requirements of the SOW." J.A. 10267.

The solicitation provided that the contract would be subject to the Service Contract Act of 1965. For such contracts, the Federal Acquisition Regulation ("FAR") requires that "successor contractors performing on contracts in excess of $2,500 for substantially the same services performed in the same locality must pay wages and fringe benefits (including accrued wages and benefits and prospective increases) **at least equal to those contained in any bona fide collective bargaining agreement entered into under the predecessor contract.**" FAR 22.1002–3(a) (emphasis added). The Army later amended the solicitation to include an updated Wage Determination. The new Wage Determination contained the collective bargaining agreement between the incumbent Kratos and the International Association of Machinists and Aerospace Local Lodge 2515.

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The Army received three proposals, including the offers from SA–TECH and Kratos. The Army's Technical Evaluation Committee initially evaluated the proposals and included all three in the competitive range. *Sys. Application & Techs.*, 100 Fed.Cl. at 696. Following a period of discussions, the Army requested final proposal revisions from the offerors. *Id.*

After a review, the Technical Evaluation Committee announced its findings in a Final Evaluation Report. While it noted potential difficulties for SA–TECH under the Labor sub-factor, it rated SA–TECH as "outstanding" for all evaluation factors. *Id.* at 697. Kratos also received "outstanding" ratings. *Id.*

The Source Selection Authority reviewed the evaluations and concluded that ***1379** SA–TECH offered the best value for the government. Because "there were no meaningful distinctions between the non-cost portions of the proposals ...," the Source Selection Authority found the "price/cost advantages of SA–TECH's proposal" tilted the balance in its favor. *Id.* at 698. The Army notified the offerors of its award decision. The notification letters disclosed SA–TECH's final price and the adjectival ratings for all offerors' proposals. *Id.*

Kratos filed a protest with the Government Accountability Office ("GAO"). Kratos argued the Army improperly added a new requirement to the solicitation when it issued the updated Wage Determination. Kratos also asserted that the Army's evaluation of labor mixes did not consider the offerors' compliance with the collective bargaining agreement. Finally the protest challenged SA–TECH's Technical/Management rating. *Id.* SA–TECH intervened in the protest. Several months later, Kratos filed a supplemental protest with the GAO. It claimed the Army's "systematic process of assigning an 'Outstanding' rating to every Factor for each bidder, regardless of the evaluator's comments and plain language of the proposals," converted the best value procurement into a lower price, technically acceptable evaluation. *Id.* at 700. Kratos highlighted the fact that the Technical Evaluation Committee assigned an "outstanding" rating to SA–TECH's proposal under the Labor sub-factor in spite of its concerns with SA–TECH's proposal on this point. *Id.*

Upon receipt of Kratos' supplemental protest, the GAO attorney informed the parties that he intended "to suggest ... that, on the face of it, the protester offer[ed] a straight forward argument as to why the agency's evaluation of the technical portions of the proposals was unreasonable." *Id.* He asked whether "the agency [was] more inclined to continue to defend the protest or take corrective action." *Id.*

SA–TECH responded to Kratos' supplemental protest. *Id.* It requested the GAO dismiss Kratos' supplemental protest because it was untimely and speculative. Moreover, SA–TECH noted that Kratos was not next in line for the contract award. Therefore, SA–TECH questioned Kratos' showing of prejudice. *Id.*

The GAO attorney again notified the parties of his view that Kratos' supplemental protest had merit. He expressed his view of the technical evaluation as well the agency's treatment of SA–TECH's purported weaknesses and concluded that the GAO would "likely sustain this protest...." J.A. 11995. The GAO invited further comments, but only from the Army.

On April 22, 2011, the Army sent a letter to the GAO, Kratos, and SA–TECH which stated:

> After review of the supplemental issues, **the Army has determined that it is in its best interest to take corrective action.** The Army intends to terminate the contract awarded to SA–TECH so that it can reopen the original solicitation. **The solicitation will then be amended** to explain the intention of providing Kratos' [collective bargaining agreement] in the solicitation.

Sys. Application & Techs., 100 Fed.Cl. at 702 (emphasis added). The Army also stated it would give offerors the opportunity to submit revised proposals and reserved the right to conduct further discussions. *Id.* The Army's letter concluded: "The Army believes that this corrective action makes the pending protest moot and ***1380** no further purpose would be served by the GAO's review of the protest. Therefore, the Army requests that the GAO dismiss Kratos' protest." J.A. 11997. On April 25, 2011, the GAO dismissed

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Kratos' protest and stated: "the agency's decision to terminate the contract award and reopen the solicitation renders the protest academic." J.A. 11998.

SA–TECH filed a protest at the Court of Federal Claims that challenged the Army's decision to engage in corrective action. SA–TECH alleged the Army's decision was arbitrary, capricious, and unreasonable because it was based on an improper and unreasonable GAO statement. *Sys. Application & Techs.,* 100 Fed.Cl. at 702. It also claimed the Army's decision to engage in corrective action independently lacked a rational basis and involved a violation of law, regulation, or procedure. *Id.* SA–TECH also took issue with the Army's decision to amend the solicitation. Kratos intervened. At the proper time, SA–TECH filed a motion for judgment on the administrative record. The Army and Kratos moved to dismiss the complaint for lack of subject matter jurisdiction and crossmoved for judgment on the administrative record.

The Court of Federal Claims denied the motions to dismiss, finding jurisdiction under 28 U.S.C. § 1491(b)(1). *Id.* at 703–10. The trial court also found that SA–TECH showed proper standing and ripeness. *Id.* On the merits, the Court of Federal Claims found the Army's decision to take corrective action was arbitrary, capricious, and an abuse of discretion. *Id.* at 719. The trial court also granted SA–TECH's request for injunctive relief, which prohibited the Army from implementing the proposed corrective action. *Id.* at 722.

The Army timely appealed to this court. The Army's appeal is limited to the questions of jurisdiction and justiciability; it does not challenge the Court of Federal Claims' merits decision. This court has jurisdiction under 28 U.S.C. § 1295(a)(3).

II.

[1] **[2]** This court reviews the Court of Federal Claims' decision on the legal question of subject matter jurisdiction without deference. *Res. Conservation Grp., LLC v. United States,* 597 F.3d 1238, 1242 (Fed.Cir.2010). Courts have limited jurisdiction to hear and decide suits against the United States due to principles of sovereign immunity. Sovereign immunity protects the government from suit except for instances in which the immunity has been unequivocally and expressly waived. *United States v. King,* 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969).

[3] **[4]** In this case, the Tucker Act expressly waives sovereign immunity for claims against the United States in bid protests. Accordingly, the Court of Federal Claims

> shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement ... without regard to whether suit is instituted before or after the contract is awarded.

28 U.S.C. § 1491(b)(1) (2006). The Court of Federal Claims correctly observed this waiver covers a broad range of potential disputes arising during the course of the procurement process. On its face, the statute grants jurisdiction over objections to a solicitation, objections to a proposed ***1381** award, objections to an award, and objections related to a statutory or regulatory violation so long as these objections are in connection with a procurement or proposed procurement. *Sys. Application & Techs.,* 100 Fed.Cl. at 704.

While the Army understandably wishes to narrow the scope of the Tucker Act's grant of jurisdiction, a narrow application of section 1491(b)(1) does not comport with the statute's broad grant of jurisdiction over objections to the procurement process. In *Resource Conservation Group, LLC v. United States,* this court considered the legislative history of the Tucker Act and its amendments. 597 F.3d at 1244–45. This court rejected the argument that section 1491(b)(1) grants the Court of Federal Claims protest jurisdiction over non-procurement disputes (such as a dispute over a lease of government property). *Id.* In so doing, this court clarified that once a party objects to a procurement,

section 1491(b)(1) provides a broad grant of jurisdiction because "[p]rocurement includes *all stages of the process of acquiring property or services,* beginning with the process for determining a need for property or services and ending with contract completion and closeout." *Id.* at 1244 (emphasis added) (quoting 41 U.S.C. § 403(2)); *see also* *Distributed Solutions, Inc. v. United States,* 539 F.3d 1340, 1345 (Fed.Cir.2008) (concluding that the statutory definition for procurement found in 41 U.S.C. § 403(2) should be utilized in determining the scope of section 1491(b)(1)).

In this case, SA–TECH objected to a solicitation and alleged violations of statutes and regulations governing the procurement process. The Army has not shown that this protest has no "connection with a procurement." Rather SA–TECH's complaint specifically challenged the Army's announced decision to amend or revise the solicitation—an unambiguous objection "to a solicitation" covered by the Tucker Act. SA–TECH also alleged violations of the Service Contract Act and procurement regulations—another basis for jurisdiction. *Distributed Solutions, Inc.,* 539 F.3d at 1345 n. 1 (noting a protestor need only make a "non-frivolous allegation of a statutory or regulatory violation in connection with a procurement or proposed procurement" in order to meet this jurisdictional requirement). The Court of Federal Claims' decision on the merits underscores that SA–TECH's allegations of procurement violations were not frivolous. *Sys. Application & Techs.,* 100 Fed.Cl. at 719.

[5] In this case, the Army had not yet implemented the corrective action. Moreover, SA–TECH was the contract awardee. Neither of these facts are material to the question of jurisdiction. This court has made clear that bid protest jurisdiction arises when an agency decides to take corrective action even when such action is not fully implemented. *See, e.g.,* *Turner Constr. Co. v. United States,* 645 F.3d 1377 (Fed.Cir.2011) (finding no jurisdictional bar for a bid protest brought by a contract awardee after the Army terminated the awardee's contract and announced its decision to follow the GAO's recommendation to re-compete a contract); *Centech Grp., Inc. v. United States,* 554 F.3d 1029 (Fed.Cir.2009) (affirming the Court of Federal Claims' merits decision in a bid protest brought by the previous contract awardee before corrective action was completed); *ManTech Telecomms. & Info. Sys. Corp. v. United States,* 49 Fed.Cl. 57 (2001), *aff'd per curiam,* 30 Fed.Appx. 995 (Fed.Cir.2002).

[6] **[7]** SA–TECH's attempt to enjoin the government from terminating its contract ***1382** did not transform its otherwise proper protest under the Tucker Act into a claim which could only be adjudicated under the Contract Disputes Act and its concomitant procedural requirements. This court confronted and rejected a similar argument in *Turner Construction,* 645 F.3d at 1387–88. A request for injunctive relief regarding the government's termination of a contract concerns the scope of the Court of Federal Claims' equitable powers; it is not an issue of Tucker Act jurisdiction. *Id.* at 1388. Thus, the Court of Federal Claims properly exercised its jurisdiction under the Tucker Act as SA–TECH both objected to a solicitation and alleged violation of statute or regulation in connection with a procurement.

III.

[8] The Court of Federal Claims also correctly determined that SA–TECH has standing to bring its protest. Traditional standing analysis invokes the "case or controversy" requirement of Article III of the Constitution. *Camreta v. Greene,* —— U.S. ——, 131 S.Ct. 2020, 2028, 179 L.Ed.2d 1118 (2011). However, standing in bid protests is framed by 28 U.S.C. § 1491(b)(1), which requires that bid protests be brought by "interested parties." 28 U.S.C. § 1491(b)(1). The "interested party" standard is more stringent than the requirements of Article III. *Weeks Marine, Inc. v. United States,* 575 F.3d 1352, 1359 (Fed.Cir.2009). SA–TECH must establish that it "(1) is an actual or prospective bidder; and (2) possess[es] the requisite direct economic interest." *Id.* (internal citations omitted).

[9] A protest will, by its nature, dictate the necessary factors for a "direct economic interest." In pre-award protests, for instance, the plaintiff must show "a non-trivial competitive injury which can be addressed by judicial relief." *Id.* at 1362. In post-award protests, the plaintiff must show it had a "substantial chance" of receiving the contract. *Rex Serv. Corp. v. United States,* 448 F.3d 1305, 1307 (Fed.Cir.2006); *see also* *Weeks Marine Inc.,* 575 F.3d at 1361–62 (rejecting the proposition that the "substantial chance" requirement

applies outside of the postaward context). SA–TECH lodges a pre-award protest against the Army's decision to resolicit proposals. *See* *Outdoor Venture Corp. v. United States,* 100 Fed.Cl. 146, 153 (2011) (collecting cases). The Army does not dispute that SA–TECH is an actual or prospective bidder. Thus, SA–TECH's standing hinges upon whether the Army's decision gives rise to a "non-trivial competitive injury which can be addressed by judicial relief."

[10] This court determines that this protest asserts the necessary injury for standing. First, the Army's decision to engage in corrective action will arbitrarily require SA–TECH to win the same award twice. *See* *CBY Design Builders v. United States,* No. 11–740C, —— Fed.Cl. ——, ——, 2012 WL 1889299, *32 (Fed.Cl. May 11, 2012) ("[A]rbitrarily being required to win the same award twice ... is certainly the sort of non-trivial competitive injury sufficient to support [a protestor's] standing to object to the corrective action."). Obtaining a contract award, whether through sealed bidding or a negotiated process, is often a painstaking (and expensive) process. An arbitrary decision to take corrective action without adequate justification forces a winning contractor to participate in the process a second time and constitutes a competitive injury to that contractor. *Cf.* *United States v. John C.* ***1383** *Grimberg Co.,* 702 F.2d 1362, 1367 (Fed.Cir.1983) (en banc) (noting that there is an implied contract that the procurement process will be conducted fairly and honestly); *Joseph L. DeClerk & Assocs., Inc. v. United States,* 26 Cl.Ct. 35, 46–47 (1992) (noting that the procurement process should be a level playing field and contractors should be treated evenly and fairly); *Hosp. Klean of Tex., Inc. v. United States,* 65 Fed.Cl. 618, 624 (2005) (noting that the lost opportunity to compete for a contract on a level playing field is an irreparable harm for the purposes of injunctive relief).

Just as important, the Army's decision to engage in corrective action will require SA–TECH to re-compete for a contract after its price had been made public. Unquestionably an offeror's participation in the procurement process involves some acceptance of risk. *See* Steven Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government,* 50 Am. U.L.Rev. 627, 695 (2002) (discussing risk allocation as a fundamental characteristic of government contracting). The risk of recompeting for a contract after revelation of one's price calculations to competitors, however, does not extend to a contract fairly competed and won on the first solicitation.

In this case, with price a pivotal term of the process, SA–TECH would unduly bear the burden of re-competing with its prices alone on the table. Price was a crucial factor in making the original contract award. Once the contracting officer eliminated meaningful distinctions between the non-cost portions of the various proposals, SA–TECH's lowest offer tipped the scales in its favor. In this case, the Army has not appealed the finding that its actions were arbitrary. Therefore, the Army without adequate justification—indeed, with arbitrariness—forces SA–TECH to re-compete for the contract. In that posture, SA–TECH will no longer have the pivotal competitive advantage from the initial solicitation. The publication of its price alone places SA–TECH in the unenviable position of competing against itself. *See* *Bayfirst Solutions, LLC v. United States,* No. 12–131C, 104 Fed.Cl. 493, 501–02, 2012 WL 1513007, at *5 (Fed.Cl. April 30, 2012) (finding that a protestor shows sufficient competitive injury if it loses a competitive advantage through the government's decision to resolicit proposals). Based on these facts, the Court of Federal Claims correctly determined that SA–TECH showed a non-trivial competitive injury and thus had standing under 28 U.S.C. § 1491(b)(1) as an interested party.

IV.

[11] **[12]** **[13]** **[14]** Finally, the Court of Federal Claims correctly found that SA–TECH presented a claim ripe for judicial review. A claim is not ripe for judicial review when it is contingent upon future events that may or may not occur. *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 580–81, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985). The purpose of the doctrine is to prevent the courts, "through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *overruled on other grounds by* *Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). In assessing ripeness, there are two basic factors: "(1) the fitness ***1384** of the issues for judicial decision[;] and (2) the hardship to the parties of withholding court consideration." *Abbott Labs.,* 387 U.S. at 149, 87 S.Ct. 1507.

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[15] **[16]** When a party challenges government action, the first factor becomes a question of whether the challenged conduct constitutes a final agency action. *See* *Tokyo Kikai Seisakusho, Ltd. v. United States,* 529 F.3d 1352, 1363 (Fed.Cir.2008); *U.S. Ass'n of Imps. of Textiles & Apparel v. U.S. Dep't of Commerce,* 413 F.3d 1344, 1349–50 (Fed.Cir.2005). Final agency action hinges on two points: "First, the action must mark the 'consummation' of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' " *Bennett v. Spear,* 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (citations omitted).

The Army asserts that SA–TECH has not challenged a final agency action. SA–TECH challenged "the Army's announcement of its intention to take corrective action—before any such action was taken." Appellant's Brief 20. According to the Army, its statements to the GAO, SA–TECH, and Kratos that it intended to engage in corrective action were not binding and "nothing prohibited the Army from abandoning its proposed course of action and allowing SA–TECH's award to stand...." *Id.* at 21. In its view, the decision to take corrective action will not be fully consummated unless and until the Army re-awards the contract to an offeror other than SA–TECH. *Id.*

This court finds no merit in the Army's argument. The Army memorialized its decision to take corrective action in a letter to the GAO and the parties, stating: "the Army **has determined** that it is in its best interest to take corrective action." J.A. 11996 (emphasis added). As the Court of Federal Claims noted, there was nothing interlocutory, uncertain, or tentative about this declaration. *Sys. Application & Techs.,* 100 Fed.Cl. at 709. Not only did the Army declare its decision to engage in corrective action, but it set in motion several irretrievable legal consequences. For instance, the Army's letter to the GAO stated: "The Army believes that this corrective action makes the pending protest moot and no further purpose would be served by the GAO's review of the protest. Therefore, the Army requests that the GAO dismiss Kratos' protest." J.A. 11997. Accordingly, the GAO dismissed Kratos' protest, changing the legal landscape for both SA–TECH and Kratos.

The Army represented that its decision to engage in corrective action was sufficiently final to moot Kratos' GAO bid protest. The Army may not now claim that the decision is not final until the re-award of a contract. Orderly procedure cannot tolerate such contradictory positions. The government cannot manipulate the finality doctrine to suit its own current litigation strategies.

Furthermore, the Army's proposed finality rule would make some of their actions protest-proof. Part of the proposed corrective action is to amend the terms of the solicitation "to explain the intention of providing Kratos' [collective bargaining agreement] in the solicitation." J.A. 11996–97. However, the Army states that its action would be final when "the new contract award decision is made." Appellant's Brief 26. If SA–TECH's claims were not ripe until after the contract award, then SA–TECH could never protest ***1385** this proposed amendment to the terms of the solicitation. *See* *Blue & Gold Fleet, L.P. v. United States,* 492 F.3d 1308, 1313 (Fed.Cir.2007) (holding that a party who fails to object to the terms of a solicitation "prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims"). As noted in *Weeks Marine,* such an absurd result cannot stand. *Weeks Marine, Inc.,* 575 F.3d at 1362–1363. Thus, the Army's decision to engage in corrective action is sufficiently final.

This court's precedent in *Tokyo Kikai Seisakusho, Ltd. v. United States* does not compel a different result. In *Tokyo Kikai Seisakusho,* this court addressed ripeness in the narrow context of the Department of Commerce's review of its own sunset rulings in antidumping cases. 529 F.3d at 1363–64. This case arises from a very different context: government procurement. Additionally, in *Tokyo Kikai Seisakusho,* the agency's non-final decision was announced as part of its role as a neutral arbiter in trade disputes. *Id.* Here, the Army announced its decision as an interested party in a litigation dispute and the GAO, a quasi-judicial body, acted on the veracity of the Army's statements.

[17] With respect to the hardship element of the ripeness analysis, the Army asserts that SA–TECH has not suffered a hardship because the "announced intention to implement corrective action is an intermediate step of a single procurement process, and the continuation of that process, while SA–TECH remains in contention, is not a hardship." Appellant's Br. 26. As discussed above, this approach ignores

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the competitive hardships SA–TECH suffers as a result of the Army's arbitrary decision to recompete the contract.

Although SA–TECH will have a remedy under the Contract Disputes Act if its contract is terminated, the possibility of this termination is still a hardship under the ripeness analysis. Unlike the standard for obtaining injunctive relief, which requires a showing of irreparable harm, the standard for ripeness requires a lesser showing of hardship. *See* *Caraco Pharm. Labs., Ltd. v. Forest Labs., Inc.*, 527 F.3d 1278, 1295 (Fed.Cir.2008) (citing *Gardner v. Toilet Goods Ass'n,* 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1976) ("Withholding court consideration of an action causes hardship to the plaintiff where the complained-of conduct has an 'immediate and substantial impact' on the plaintiff.")). SA–TECH made a showing of immediate and substantial impact in this case.

V.

The Court of Federal Claims correctly exercised its jurisdiction and properly found SA–TECH's claims justiciable. SA–TECH's protest met the requirements of the Tucker Act and met the standards for ripeness and standing.

AFFIRMED.

All Citations

691 F.3d 1374

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144 Fed.Cl. 433
United States Court of Federal Claims.

SPACE EXPLORATION TECHNOLOGIES CORP., Plaintiff,
v.
The UNITED STATES, Defendant,
v.
Blue Origin, LLC, et al., Defendant-Intervenors.

No. 19-742C
|
Filed Under Seal: August 26, 2019
|
Reissued: August 28, 2019 *

* This Memorandum Opinion and Order was originally filed under seal on August 26, 2019 (docket entry no. 75). The parties were given an opportunity to advise the Court of their views with respect to what information, if any, should be redacted from the Memorandum Opinion and Order. The parties filed a joint status report on August 27, 2019 (docket entry no. 76) indicating that no redactions are necessary. And so, the Court is reissuing its Memorandum Opinion and Order, dated August 26, 2019 as the public opinion.

Synopsis

Background: Unsuccessful bidder on United States Air Force's (USAF) Space and Missile System Center's request to provide space launch services for national security missions, pursuant to Department of Defense's (DoD) authority to enter into "other transactions," filed post-award bid protest seeking declaratory and injunctive relief. Government moved to dismiss and unsuccessful bidder moved to transfer venue.

Holdings: The Court of Federal Claims, Lydia Kay Griggsby, J., held that:

[1] USAF's launch service agreement request for proposals was not a "procurement contract," as would give rise to Court of Federal Claims' jurisdiction, under Tucker Act, and

[2] USAF's launch service agreement request for proposals was not "in connection with a procurement," for Tucker Act purposes.

Motions granted.

Procedural Posture(s): Review of Administrative Decision.

West Headnotes (8)

[1] **United States** Dismissal
United States Construction and presumptions as to pleadings

When deciding a motion to dismiss upon the ground that court does not possess subject-matter jurisdiction, Court of Federal Claims must assume that all factual allegations in complaint are true and must draw all reasonable inferences in non-movant's favor. RCFC, Rule 12(b)(1).

[2] **United States** As to jurisdiction

Plaintiff bears burden of establishing subject-matter jurisdiction of Court of Federal Claims, and it must do so by a preponderance of the evidence.

[3] **Public Contracts** Judicial Remedies and Review
United States Judicial Remedies and Review

Since Tucker Act's bid protest language granting Court of Federal Claims jurisdiction is exclusively concerned with procurement solicitations and contracts, relief in bid protest matters is unavailable outside the context of a procurement or proposed procurement. 28 U.S.C.A. § 1491(b)(1).

1 Cases that cite this headnote

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[4] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

To establish jurisdiction under Tucker Act to challenge government's award of contract, a contractor must show that the government at least initiated a procurement, or initiated the process for determining a need for acquisition. 28 U.S.C.A. § 1491(b)(1).

2 Cases that cite this headnote

[5] **Federal Courts** In general; transfer between divisions

Party seeking transfer to cure want of jurisdiction has burden to identify proposed transferee court and show that jurisdiction would be proper there. 28 U.S.C.A. § 1631.

1 Cases that cite this headnote

[6] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

United States Air Force's (USAF) launch service agreement request for proposals to perform prototype development for national security space missions was not a "procurement contract," as would give rise to Court of Federal Claims' jurisdiction, under Tucker Act, to hear unsuccessful bidder's protest; USAF entered into launch service agreement pursuant to authority that Congress granted to Department of Defense (DoD) to enter into "other transactions," and launch service agreement was not subject to federal laws and regulations applicable to procurement contracts. 10 U.S.C.A. §§ 2371(a), 2371b; 28 U.S.C.A. § 1491(b)(1); 32 C.F.R. § 3.2.

1 Cases that cite this headnote

[7] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

United States Air Force's (USAF) launch service agreement request for proposals to perform prototype development for national security space missions was not "in connection with a procurement," as would give rise to Court of Federal Claims' jurisdiction, under Tucker Act, to hear unsuccessful bidder's protest; although USAF employed a four-phase strategy, using different solicitations and other steps to be implemented following prototype development, fact that development of prototype launch vehicles could eventually lead to USAF's later acquisition of launch services was insufficient, alone, to render its decision "in connection with" a procurement, especially given that agency would not purchase or own the prototypes in the first phase, which was focus of bid challenge. 10 U.S.C.A. §§ 2371(a), 2371b; 28 U.S.C.A. § 1491(b)(1); 32 C.F.R. § 3.2.

3 Cases that cite this headnote

[8] **Federal Courts** Other particular cases, contexts, and questions

Transfer of case from United States Court of Federal Claims to the United States District Court for the Central District of California was in the interest of justice where Court of Federal Claims lacked jurisdiction, under Tucker Act, to hear plaintiff's claim challenging United States Air Force's (USAF) selection of prototype developers for space launch services for national security missions, matter could have been brought in District Court in California, where plaintiff's place of business was located and USAF award decision was made, and plaintiff alleged a nonfrivolous claim that USAF based its portfolio award decision on an arbitrary and unequal evaluation process. 28 U.S.C.A. §§ 1491(b)(1), 1631.

3 Cases that cite this headnote

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Attorneys and Law Firms

***434** Craig A. Holman, Attorney of Record, Kara L. Daniels, David M. Hibey, Sonia Tabriz, Nathaniel E. Castellano, Of Counsel, Arnold & Porter Kaye Scholer LLP, Washington, DC, for plaintiff.

Tanya B. Koenig, Trial Attorney, Douglas Edelschick, Of Counsel, Douglas K. Mickle, Assistant Director, Robert E. Kirschman, Jr., Director, Joseph H. Hunt, Assistant Attorney General, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC; Erika Whelan Retta, Air Force Legal Operations Agency; Gregory Yokas, Space and Missile Systems Center, Office of the Staff Judge Advocate, for defendant.

Scott E. Pickens, Counsel of Record, Michael A. Hordell, Matthew J. Michaels, Scott N. Godes, Of Counsel, Barnes & Thornburg LLP, Washington, DC, for Blue Origin, LLC, defendant-intervenor.

Todd R. Steggerda, Counsel of Record, Benjamin L. Hatch, Edwin O. Childs, Jr., Nathan R. Pittman, Karlee S. Blank, Blake R. Christopher, Of Counsel, McQuireWoods, LLP, Washington, DC, for United Launch Services, LLC, defendant-intervenor.

Kevin Patrick Mullen, Counsel of Record, David A. Churchill, Sandeep N. Nandivada, R. Locke Bell, Lauren J. Horneffer, Charles L. Capito III, Of Counsel, Morrison & Foerster, LLP, Washington, DC; Maureen F. Del Duca, Kenneth M. Reiss, Of Counsel, Northrop Grumman Corporation, Falls Church, VA, for Orbital Sciences Corporation, defendant-intervenor.

BID PROTEST

Post-Award Bid Protest; Motion to Dismiss; Rule 12(b)(1); Other Transactions; 10 U.S.C. §§ 2371 and 2371b.

MEMORANDUM OPINION AND ORDER

GRIGGSBY, Judge

I. INTRODUCTION

In this post-award bid protest matter, Space Exploration Technologies Corp. ("SpaceX") ***435** challenges the United States Air Force Space and Missile Systems Center's (the "Air Force") evaluation and portfolio award decisions for a request for proposals to provide space launch services for national security missions, issued pursuant to the Department of Defense's ("DoD") authority to enter into other transaction agreements. *See generally* Compl. The government has moved to dismiss this matter for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"). *See generally* Def. Mot. SpaceX has also moved to transfer this matter to the United States District Court for the Central District of California. *See generally* Pl. Resp. For the reasons discussed below, the Court: (1) **GRANTS** the government's motion to dismiss; (2) **GRANTS** SpaceX's motion to transfer venue; and (3) **DISMISSES** the complaint.

II. FACTUAL AND PROCEDURAL BACKGROUND [1]

1 The facts recited in this Memorandum Opinion and Order are taken from the complaint ("Compl."); the corrected administrative record ("AR"); and the government's motion to dismiss ("Def. Mot."). Except where otherwise noted, the facts stated herein are undisputed.

A. Factual Background

SpaceX provides space launch services to the United States Government and to commercial customers. Compl. at ¶ 90. In this post-award bid protest matter, SpaceX challenges the Air Force's evaluation and portfolio award decisions for launch service agreement ("LSA") request for proposal, Solicitation No. FA8811-17-9-001 (the "LSARFP"), to facilitate the development of launch systems in the United States. Compl. at 1. As relief, SpaceX requests, among other things, that the Court: (1) declare the Air Force's portfolio award decision to be contrary to Congress's mandate for assured access to space; (2) enjoin any further investment in the launch service agreements awarded by the Air Force; (3) enjoin further performance by the awardees; and (4) require the Air Force to reevaluate proposals. *Id.* at 78.

1. DoD's Authority To Use Other Transaction Agreements

As background, Congress granted the Department of Defense the authority to enter into other transactions ("OT"). 10 U.S.C. §§ 2371(a) and 2371b(a). OTs are agreements that are not procurement contracts, cooperative agreements, or grants. *See, e.g.*, 10 U.S.C.

§ 2371(a) (authorizing "transactions (other than contracts, cooperative agreements, and grants)"); 32 C.F.R. § 3.2 (defining "other transactions" as "transactions other than contracts, grants or cooperative agreements"); *see also* United States Department of Defense, Other Transactions Guide (2018), at 5 ("OT Guide"), https://www.dau.mil/guidebooks/Shared% 20Documents/Other% 20Transactions % 20(OT)% 20Guide.pdf (defining OTs as "NOT: a. FAR-based procurement contracts; b. Grants; c. Cooperative Agreements; or d. Cooperative Research and Development Agreements (CRADAs)").

While not defined by statute, the Government Accountability Office ("GAO") has defined OTs as follows:

> An 'other transaction' agreement is a special type of legal instrument used for various purposes by federal agencies that have been granted statutory authority to use 'other transactions.' GAO's audit reports to the Congress have repeatedly reported that 'other transactions' are 'other than contracts, grants, or cooperative agreements that generally are not subject to federal laws and regulations applicable to procurement contracts.'

MorphoTrust USA, LLC, B-412711, 2016 WL 2908322, at *4 (Comp. Gen. May 16, 2016). The DoD's OT Guide also provides that OTs are intended "to give DoD the flexibility necessary to adopt and incorporate business practices that reflect commercial industry standards and best practices into its award instruments." OT Guide at 4. And so, OTs are "generally not subject to the Federal laws and regulations limited in applicability to contracts, grants or cooperative agreements" and these agreements are "not required to comply with the Federal Acquisition Regulation (FAR) and its supplements." 32 C.F.R. § 3.2.

***436** Pursuant to 10 U.S.C. § 2731b, DoD may use its other transaction authority to "carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces." 10 U.S.C. § 2731b(a).[2] But, DoD may only use this authority if one of the four conditions set forth below have been met:

> (A) There is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent in the prototype project.
>
> (B) All significant participants in the transaction other than the Federal Government are small businesses (including small businesses participating in a program described under section 9 of the Small Business Act (15 U.S.C. [§] 638)) or nontraditional defense contractors.
>
> (C) At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government.
>
> (D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

10 U.S.C. § 2371b(d)(1); *see also* OT Guide at 13-14; 32 C.F.R. § 3.5. In addition, Congress has required that, "[t]o the maximum extent practicable, competitive procedures shall be used when entering into [OT] agreements to carry out the prototype projects." 10 U.S.C. § 2371b(b)(2).

2 Title 10, United States Code, section 2358 authorizes DoD to "engage in basic research, applied research, advanced research, and development projects." 10 U.S.C. § 2358(a).

2. The National Security Space Launch Program

The National Security Space Launch program—previously known as the EELV program (the "Program")—is charged with procuring launch services to meet the government's national security space launch needs. AR Tab 19 at 786. The Program has an overarching need through FY30 to address the challenges of maintaining affordability and assured access to space, which requires the Air Force to sustain the availability of at least two families of space launch vehicles and a robust space launch infrastructure and industrial base. *Id.* at 787; *see also* 10 U.S.C. § 2273(b). The actions necessary to ensure continued access to space have been defined by Congress to include:

> (1) the availability of at least two space launch vehicles (or families of space launch vehicles) capable of delivering into space any payload designated by the Secretary of

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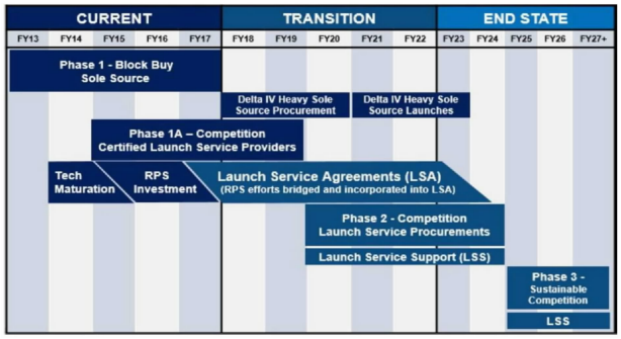
> Defense or the Director of National Intelligence as a national security payload
>
> (2) a robust space launch infrastructure and industrial base; and
>
> (3) the availability of rapid, responsive, and reliable space launches for national security space programs to—
>
> (A) improve the responsiveness and flexibility of a national security space system;
>
> (B) lower the costs of launching a national security space system; and
>
> (C) maintain risks of mission success at acceptable levels.

10 U.S.C. § 2273(b).

As shown below, the Program involves a multi-phase strategy that will be implemented by the Air Force between FY 2013 and FY 2027 to accomplish the aforementioned actions. AR Tab 19 at 788.

***437**



Id.

a. The LSA Competition

The LSARFP involves a competition for the development of space launch vehicles (the "LSA Competition"). *Id.* at 788. During the LSA Competition, the Air Force sought to develop "launch system prototypes, to include the development and test of any required [rocket propulsion systems], the launch vehicle and its subsystems, infrastructure, manufacturing processes, test stands, and other items required for industry to provide domestic commercial launch services that meet all [National Security Space] requirements." AR Tab 38 at 1261. The prototype sought to be developed during the LSA Competition includes "[a] fully developed and certified EELV Launch System, including the validation of all non-recurring engineering (NRE) work." *Id.* And so, the awardees of the LSA will receive funding from the Air Force and these awardees "will perform prototype development, including system design and development, risk reduction activities, test and evaluation activities, and technical demonstration of system capabilities." AR Tab 19 at 796.

The Air Force expects that following its investment "in the development of prototypes for launch systems," those systems can be "used to provide commercial launch services that will also be extended to provide [National Security Space] launch services." *Id.* at 793. The Air Force also acknowledges that the LSAs will "facilitate development of at least three EELV Launch System prototypes as early as possible, allowing those launch systems to mature prior to a future selection of two [National Security Space] launch service providers for Phase 2 launch service procurements, starting in FY 20[20]." AR Tab 38 at 1260.

b. The Phase 2 Procurement

During Phase 2 of the Program, the Air Force anticipates awarding two requirements contracts for launch services, delivering multiple national security space missions with annual ordering periods from FY 2020 through FY 2024. Compl. Ex. B at 2. Congress has mandated that, with some exceptions, "the Secretary of Defense may not award or renew a contract for the procurement of property or services for space launch activities under the [Program] if such contract carries out such space launch activities using rocket engines designed or manufactured in the Russian Federation." FY 2015 National Defense Authorization Act, Pub. L. No. 113-291, 128 Stat. 3292, 3626 (2014). And so, a key goal of the Program is to transition from the use of non-allied space launch engines. AR Tab 38 at 1260.

The Air Force has described the Phase 2 Procurement as a "follow-on activit[y]." AR Tab 19 at 807; *see also id.* at 810 ("The follow-on activity will be procurement of launch services.") The Air Force has also stated that the "LSA is designed to work in ***438** synergy with commercial launch vehicle development efforts that will lead in space for decades to come." AR Tab 47 at 1351.

The Phase 2 Procurement is open to all interested offerors. AR Tab 19 at 807. And so, this procurement will not

be limited to the organizations that have received awards during the LSA Competition. *See* AR Tab 19 at 786 ("FAR-based procurement contracts will be competitively awarded to certified EELV launch service providers, which could include companies that were not previously awarded LSAs"); *id.* at 807 ("[T]he Air Force intends to use a full and open competition to award FAR-based [firm-fixed priced] contracts to two launch providers for [National Security Space] launch service procurements ..."); *see also* Status Conf. Tr. at 17:1-17:5, 18:15-18:18.

3. The LSA Award

The Air Force issued the LSARFP on October 5, 2017. *See generally* AR Tab 35. On March 21, 2018, the Assistant Secretary of the Air Force (Acquisition, Technology & Logistics) determined that "exceptional circumstances surrounding the [Program] and the domestic launch industry justify the use of a transaction that provides for innovative business arrangements and provide[s] an opportunity to expand the defense supply base in a manner that would not be feasible under a contract." AR Tab 47 at 1349. And so, the Air Force issued the LSARFP pursuant to DoD's authority to enter into other transactions. *Id.*

SpaceX and three other companies—United Launch Alliance, LLC ("ULA"), Blue Origin, LLC ("Blue Origin") and Orbital Sciences Corporation ("Orbital ATK")—submitted proposals in response to the LSARFP. *See* AR Tab 136 at 41752. Following discussions, negotiations and the receipt of revised proposals, the Air Force awarded LSAs to Blue Origin, ULA, and Orbital ATK in October 2018. *Id.* at 41753. The LSAs awarded to ULA, Blue Origin, and Orbital ATK provide these awardees with investment funding to develop launch vehicle prototypes. AR Tab 38 at 1261.

SpaceX filed an objection to the aforementioned portfolio awards with the Air Force on December 10, 2018. Compl. at ¶ 76; Compl. Ex. R at 2. The Air Force subsequently denied SpaceX's objection on April 18, 2019. Compl. at ¶ 79; Compl. Ex. R at 1. SpaceX commenced this post-award bid protest action on May 17, 2019. *See generally* Compl.

B. Procedural Background

SpaceX commenced this post-award bid protest matter on May 17, 2019. *See generally id.* On May 21, 2019, Blue Origin and ULA filed unopposed motions to intervene in this matter. *See generally* Blue Origin Mot. to Intervene; ULA Mot. to Intervene. On May 22, 2019, the Court granted these motions and entered a Protective Order in this matter. *See generally* Scheduling Order, dated May 22, 2019; *see also* Protective Order, dated May 22, 2019. On May 22, 2019, Orbital ATK filed an unopposed motion to intervene. *See generally* Orbital Mot. to Intervene. On May 23, 2019, the Court granted this motion. *See generally* Order, dated May 23, 2019.

On June 11, 2019, the government filed the administrative record. *See generally* Initial AR. On June 13, 2019, the government filed a motion to dismiss this matter for lack of subject-matter jurisdiction. *See generally* Def. Mot. On June 26, 2019, the government filed a corrected administrative record. *See generally* AR.

On June 28, 2019, SpaceX filed a response and opposition to the government's motion to dismiss and, in the alternative, a motion to transfer venue. *See generally* Pl. Resp. On July 9, 2019, the government filed a reply in support of its motion to dismiss and a response to SpaceX's motion to transfer venue.[3] *See generally* Def. Reply. On August 15, 2019, the Court held oral argument on the parties' motions. *See generally* Oral Arg. Tr.

3 ULA, Blue Origin, and Orbital ATK have not participated in the briefing of the government's motion to dismiss.

These matters having been fully briefed, the Court resolves the pending motions.

*439 III. LEGAL STANDARDS

A. RCFC 12(b)(1)

[1] **[2]** When deciding a motion to dismiss upon the ground that the Court does not possess subject-matter jurisdiction pursuant to RCFC 12(b)(1), this Court must assume that all factual allegations in the complaint are true and must draw all reasonable inferences in the non-movant's favor. *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007); RCFC 12(b)(1). But, a plaintiff bears the burden of establishing subject-matter jurisdiction, and it must do so by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) (citing *Zunamon v. Brown*, 418 F.2d 883, 886 (8th Cir. 1969)). Should the Court determine that "it lacks jurisdiction over the subject

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matter, it must dismiss the claim." *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); RCFC 12(h)(3).

B. Bid Protest Jurisdiction

[3] The Tucker Act grants the United States Court of Federal Claims jurisdiction over bid protests brought by "an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). The United States Court of Appeals for the Federal Circuit has held that the Tucker Act's bid protest language "is exclusively concerned with procurement solicitations and contracts." *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1245 (Fed. Cir. 2010); *see also United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976) ("[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' ") (citation omitted). And so, relief in bid protest matters pursuant to the Tucker Act is unavailable outside the context of a procurement or proposed procurement. *Res. Conservation*, 597 F.3d at 1245; *see, e.g.*, *Hymas v. United States*, 810 F.3d 1312, 1329-30 (Fed. Cir. 2016) (finding no jurisdiction over cooperative farming agreements).

[4] The Tucker Act does not define the term "procurement." *See generally* 28 U.S.C. § 1491(b)(1). But, the Federal Circuit has relied upon the definition of procurement set forth in 41 U.S.C. § 111 to determine whether a procurement has occurred. *Distributed Sols., Inc. v. United States*, 539 F.3d 1340, 1345 (Fed. Cir. 2008) (this section was formerly cited as 41 U.S.C. § 403(2)). Section 111 defines procurement to cover "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 U.S.C. § 111; *see also AgustaWestland N. Am., Inc. v. United States*, 880 F.3d 1326, 1330 (Fed. Cir. 2018); 10 U.S.C. § 2302(3) (stating that the term "procurement" has the meaning provided in chapter 1 of title 41, United States Code). And so, the Federal Circuit has held that, to establish jurisdiction, a contractor must show " 'that the government at least initiated a procurement, or initiated the process for determining a need for acquisition.' " *AgustaWestland*, 880 F.3d at 1330 (quoting *Distributed Sols.*, 539 F.3d at 1346) (internal quotations omitted).

Specifically relevant to this dispute, in *Hymas*, the Federal Circuit held that the competitive requirements of CICA did not apply to the United States Fish and Wildlife Service's cooperative farming agreements, because the cooperative farming agreements were not procurement contracts under the Federal Grant and Cooperative Agreement Act. 810 F.3d at 1320, 1329-30. And so, the Federal Circuit concluded that this Court must dismiss a bid protest action challenging the government's award of these agreements for lack of subject-matter jurisdiction. *Id.* at 1330.

The Federal Circuit has also considered the meaning of the phrase "in connection with a procurement or a proposed procurement." *See* 28 U.S.C. § 1491(b)(1). In this regard, the Federal Circuit has held that "[t]he operative phrase 'in connection with' is very sweeping in scope." ***440** *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999). The Federal Circuit has also held that an alleged statutory violation suffices to supply Tucker Act jurisdiction, so long as the statute has a connection to a procurement proposal. *Id.* In addition, the Federal Circuit has recognized that Congress intended for all objections connected to a procurement or proposed procurement to be heard by this Court. *See Emery Worldwide Airlines, Inc. v. United States,* 264 F.3d 1071, 1079 (Fed. Cir. 2001) (noting that the Administrative Dispute Resolution Act of 1996 made clear that "Congress sought to channel the entirety of judicial government contract procurement protest jurisdiction to the Court of Federal Claims"). And so, the Federal Circuit has held that "a narrow application of section 1491(b)(1) does not comport with the [Tucker Act's] broad grant of jurisdiction over objections to the procurement process." *Sys. App. & Techs., Inc. v. United States*, 691 F.3d 1374, 1381 (Fed. Cir. 2012).

There are, however, limits to the Court's bid protest jurisdiction under the Tucker Act. For example, the Federal Circuit held in *AgustaWestland* that an execution order regarding the use of Army helicopters was not "in connection with a procurement or proposed procurement," "because it did not begin 'the process for determining a need for property or services.' " 880 F.3d at 1331 (quoting *Distributed Sols.*, 539 F.3d at 1345). In *Geiler/Schrudde & Zimmerman v. United States*, the Federal Circuit also held that the Department of Veterans Affairs' revocation of a bidder's status as a service-disabled veteran-owned small business was not a decision "in connection with a procurement or a proposed procurement," because the revocation had no effect upon the award or

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performance of any contract. 743 Fed. App'x 974, 977 (Fed. Cir. 2018).

Similarly, in *BayFirst Sols, LLC v. United States*, this Court addressed the limits of the phrase "in connection with a procurement or proposed procurement" in determining whether the Federal Acquisition Streamlining Act's bar on challenges in connection with the issuance or proposed issuance of a task or delivery order would bar the cancellation of a solicitation. 104 Fed. Cl. 493, 507 (2012). In that case, the Court determined that the cancellation decision was not "in connection with" the task order award, because the cancellation decision was "a discrete procurement decision and one which could have been the subject of a separate protest." *Id.* Lastly, in *R & D Dynamics Corp. v. United States*, this Court held that a Phase II Small Business Innovation Research ("SBIR") non-procurement award was not "in connection with" a Phase III procurement, because the SIBR Phase II program appeared to be "of a developmental nature." 80 Fed. Cl. 715, 722 (2007). And so, the Court determined that the SBIR award was not "in connection with" a procurement, notwithstanding the possibility that the SBIR award "may ultimately lead to the development of a capacity to provide goods or services in Phase III." *Id.*

C. 10 U.S.C. §§ 2371 And 2371b

Title 10, United States Code, section 2371 generally provides DoD with the statutory authority to enter into other transaction agreements in carrying out "basic, applied, and advanced research projects." 10 U.S.C. § 2371(a). Pursuant to Title 10, United States Code, section 2371b, DoD may use its OT authority to carry out certain prototype projects. 10 U.S.C. § 2371b. Specifically, this statute provides that DoD may:

> carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.

10 U.S.C. § 2371b(a)(1). Section 2371b also requires that, "[t]o the maximum extent practicable," DoD use competitive procedures when entering into agreements to carry out the prototype projects. *Id.* at § 2371b(b)(2). In addition, the statute provides that DoD may only use this authority if one of the following conditions are met:

> (A) There is at least one nontraditional defense contractor or nonprofit research ***441** institution participating to a significant extent in the prototype project.
>
> (B) All significant participants in the transaction other than the Federal Government are small businesses (including small businesses participating in a program described under section 9 of the Small Business Act (15 U.S.C. [§] 638)) or nontraditional defense contractors.
>
> (C) At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government.
>
> (D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

Id. at § 2371b(d)(1).

D. Transfer Of Venue

[5] Lastly, Title 28, United States Code, section 1631 provides that:

> Whenever a civil action is filed in a court ... and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court ... in which the action or appeal could have been brought at the time it was filed or noticed.

28 U.S.C. § 1631. The Federal Circuit has held that the burden is on the party seeking transfer "to identify the proposed

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transferee court and show that jurisdiction would be proper there." *Maehr v. United States*, 767 Fed. App'x 914, 916 (Fed. Cir. 2019) (per curiam) (citing *Hill v. Dep't of the Air Force*, 796 F.2d 1469, 1470-71 (Fed. Cir. 1986)). And so, the Court may transfer a matter to a district court, if the Court determines that it lacks subject-matter jurisdiction to consider a matter and that a transfer of venue would be in the interest of justice. 28 U.S.C. § 1631.

IV. LEGAL ANALYSIS

The government has moved to dismiss this post-award bid protest matter for lack of subject-matter jurisdiction upon the ground that SpaceX's challenges to the Air Force's evaluation and portfolio award decisions are not "in connection with a procurement or proposed procurement," as contemplated by the Tucker Act. Def. Mot. at 24-32. The government also argues that the Court should dismiss this matter for want of subject-matter jurisdiction, because SpaceX does not allege a violation of a procurement statute. *Id.* at 32-33. And so, the government contends that the claims asserted in this bid protest matter fall beyond the boundaries of the Tucker Act. *Id.* at 20-24.

In its response and opposition to the government's motion to dismiss, SpaceX counters that the Court may entertain this bid protest matter because SpaceX alleges non-frivolous violations of law that are in connection with the Air Force's ongoing procurement of launch services during Phase 2 of the National Security Space Launch Program. Pl. Resp. at 19-25. SpaceX also contends that the Court possesses subject-matter jurisdiction to consider its claims, because the Air Force violated 10 U.S.C. § 2371b and the Administrative Procedure Act, 5 U.S.C. §§ 551-59, during the LSA Competition. *Id.* at 31-37. And so, SpaceX requests that the Court deny the government's motion to dismiss, or, alternatively, transfer this matter to the United States District Court for the Central District of California. *Id.* at 37-39.

For the reasons set forth below, SpaceX has not shown that the Court possesses subject-matter jurisdiction to consider any of its claims. And so, the Court: (1) **GRANTS** the government's motion to dismiss; (2) **GRANTS** SpaceX's motion to transfer venue; and (3) **DISMISSES** the complaint.

A. The Court May Not Consider SpaceX's Claims

The parties appear to agree that the launch service agreements at issue in this bid protest matter are not procurement contracts and that the LSARFP was not a procurement. *See* Def. Mot. at 1-2, 24; Pl. Resp. at 5, 16; Def. Reply at 4-6; Oral Arg. Tr. 9:20-10:10. The parties disagree, however, about ***442** whether the Air Force's evaluation and the portfolio award decisions for the LSA Competition are, nonetheless, "in connection with a procurement or proposed procurement," as contemplated by the Tucker Act. Def. Mot. at 24-32; Pl. Resp. at 19-25.

In this regard, SpaceX argues that the Air Force's evaluation and portfolio award decisions are "in connection with" the ongoing procurement of launch services during Phase 2 of the Program, because the LSA Competition "was the third step in a multi-stage procurement process that the [Air Force] devised to fulfill the [a]gency's identified need to procure domestic launch services." Pl. Resp. at 2; *see also Id.* at 19-25. The government counters that the Air Force's decisions are not "in connection with a procurement or proposed procurement," because the LSA Competition involved a solicitation that was separate and distinct from the Phase 2 Procurement. Def. Mot. at 28-32; Def. Reply at 11-16. For the reasons set forth below, the Court agrees.

1. LSAs Are Not Procurement Contracts

As an initial matter, there can be no genuine dispute that the LSAs at issue in this dispute are not procurement contracts that fall within the purview of this Court's bid protest jurisdiction. The administrative record shows that the Air Force entered into the LSAs pursuant to the authority that Congress granted to the DoD to enter into other transactions under 10 U.S.C. §§ 2371 and 2371b. AR Tab 38 at 1263; 10 U.S.C. §§ 2371 and 2371b; *see also* Def. Mot. at 1-2, 18, 24; Pl. Resp. at 5, 16, 26. Neither this Court nor the Federal Circuit has examined the question of whether the Court's bid protest jurisdiction extends to disputes involving the award of LSAs. But, the Federal Circuit has made clear that the Tucker Act's bid protest language "is exclusively concerned with procurement solicitations and contracts." *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1245 (Fed. Cir. 2010); *see also United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976) ("[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' ") (citation omitted). And so, this dispute must concern a procurement

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solicitation or contract to fall within the boundaries of the Tucker Act.

The Federal Circuit has also held that this Court must dismiss a bid protest action challenging the award of cooperative farming agreements for lack of subject-matter jurisdiction, because cooperative farming agreements are not procurement contracts. *Hymas*, 810 F.3d at 1320, 1329-30. And so, the Court reads *Hymas* to require that it must dismiss a bid protest matter challenging agency decisions that are related to the award of an agreement that is not a procurement contract. *Id.*

[6] In this case—like in *Hymas*—the record evidence makes clear that the LSAs are not procurement contracts. *See* 10 U.S.C. § 2371(a); *see also* 32 C.F.R. § 3.2. Rather, the administrative record shows that the Air Force entered into the LSAs pursuant to the authority that Congress has granted to DoD to enter into other transactions pursuant to 10 U.S.C. § 2371b. The administrative record also shows that LSAs are are not subject to the federal laws and regulations applicable to procurement contracts. AR Tab 38 at 1263; *see also MorphoTrust USA, LLC*, B-412711, 2016 WL 2908322, at *4 (Comp. Gen. May 16, 2016). Given this, the Court agrees with the government that this Court may not exercise its bid protest jurisdiction under the Tucker Act to consider a challenge to the Air Force's evaluation and portfolio award decisions.[4] *Hymas*, 810 F.3d at 1320, 1329-30; *Res. Conservation Grp.*, 597 F.3d at 1245 (stating that the Tucker Act's bid protest language "is exclusively concerned with procurement solicitations and contracts"); RCFC 12(b)(1).

4 The Court does not reach the issue of whether other transactions generally fall beyond the Court's bid protest jurisdiction under the Tucker Act. The Court simply concludes that the specific facts in this case show that the LSAs at issue are not procurement contracts and therefore, the Air Force's decisions related to the award of these agreements may not be reviewed by the Court pursuant to the bid protest provision of the Tucker Act.

2. SpaceX Has Not Shown That The Air Force's Decisions Are In Connection With A Procurement

SpaceX also has not shown that the Air Force's evaluation and portfolio award decisions ***443** during the LSA Competition are "in connection with a procurement or proposed procurement." The Federal Circuit has held that "[t]he operative phrase 'in connection with' is very sweeping in scope." *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d at 1286, 1289 (Fed. Cir. 1999). But, the Federal Circuit has also recognized that there are limits to this Court's bid protest jurisdiction under the Tucker Act. *See, e.g.*, *AgustaWestland N. Am., Inc. v. United States*, 880 F.3d 1326, 1330 (Fed. Cir. 2018). And so, not every decision *related* to a procurement is "in connection with a procurement or proposed procurement" as contemplated by the Tucker Act.

In this case, SpaceX argues with some persuasion that the Air Force's evaluation and portfolio award decisions are related to the Air Force's Phase 2 Procurement, because the LSA portfolio award will lead to the development of launch vehicles to be bid during the Phase 2 Procurement. Pl. Mot. at 2; Oral Arg. Tr. at 36:23-36:25. In this regard, the administrative record shows that the LSA Competition and Phase 2 Procurement share the mission of assuring the Nation's access to space and eliminating reliance upon Russian-made rocket engines. AR Tab 19 at 791; *see also* AR Tab 19 at 786; AR Tab 38 at 1260 (stating the goal of the Program "is to leverage commercial launch solutions in order to have at least two domestic, commercial launch service providers that also meet [National Security Space] requirements, including the launch of the heaviest and most complex payloads"). During oral argument, SpaceX also correctly observed that the funding provided by the Air Force pursuant to the LSAs will aid the development of prototype launch vehicles that Blue Origin, Orbital ATK and ULA will bid during the Phase 2 Procurement. Oral Arg. Tr. at 29:21-29:25; 36:21-37:1; 57:5-57:12. And so, the record evidence shows that the funding provided pursuant to the LSAs will help the Air Force competitively procure launch services during the Phase 2 Procurement. AR Tab 38 at 1260.

But, the record evidence also shows that, while related to the Phase 2 Procurement, the Air Force's evaluation and portfolio award decisions are not "in connection with" that procurement for several reasons.

[7] First, as the government persuasively argues in its motion to dismiss, the administrative record shows that the LSA Competition and the Phase 2 Procurement involve separate and distinct solicitations. Def. Mot. at 28-29; Def. Reply at 12-13. It is a well-established tenet of procurement law that a selection decision made under one procurement or solicitation does not govern the selection under a different procurement or solicitation. *SDS Int'l v. United States*, 48 Fed. Cl. 759,

772 (2001); *see also Griffy's Landscape Maint. LLC v. United States*, 51 Fed. Cl. 667, 671 (2001) ("[A]n attack upon a new solicitation or upon any other aspect of the administration of the previous contract, must stand on its own."). And so, generally, the Court must view the Air Force's evaluation and portfolio award decisions during the LSA Competition separately from the selection of awardees for the Phase 2 Procurement for launch services contracts. *Id.*

In this case, the Air Force's Acquisition Strategy Document for the Program makes clear that the Program consists of a four-phase strategy that will employ different solicitations and other steps to be implemented by the Air Force between FY 2013 to FY 2027. *See* AR Tab 19 at 788. Specifically, this document provides that the LSA Competition sought certified launch service providers to develop launch system prototypes and that this competition commenced in FY 2017 and will conclude in FY 2024. *Id. Id.* at 786, 788. By comparison, the Air Force's Acquisition Strategy Document shows that the Phase 2 Procurement will involve a procurement for launch services and that this procurement will commence in FY 2020 and will conclude in FY 2024. *Id.* at 788. And so, the record evidence supports the government's view that the LSA Competition and the Phase 2 Procurement are two separate and distinct parts of a multi-phase program.

Second, the administrative record also shows that the LSA Competition and the Phase 2 Procurement involve different acquisition strategies. Def. Mot. at 29-30; Def. Reply at 13. As discussed above, the Air Force issued the LSARFP to facilitate the ***444** successful development of launch systems pursuant to the DoD's authority to enter into other transactions. AR Tab 38 at 1263. And so, the LSA Competition was not subject to the requirements of the FAR. AR Tab 35 at 1068 ("[T]he FAR and its supplements do not apply to this selection process"); s*ee also* AR Tab 19 at 794-95; 10 U.S.C. §§ 2371 and 2371b; Def. Mot. at 29. In contrast, the Phase 2 Procurement will involve a FAR-based competition. AR Tab 19 at 807 (stating that "the Air Force intends to use a full and open competition to award FAR-based [firm-fixed priced] contracts to two launch providers for [National Security Space] launch service procurements"). Given this, the record evidence makes clear that the LSA Competition and the Phase 2 Procurement also differ with regards to how bidders will compete and the legal requirements that govern each solicitation.

The administrative record also makes clear that the specific goals of the LSA Competition and the Air Force's Phase 2 Procurement differ. The goal of the LSA competition is to increase the pool of launch vehicles that meet the Air Force's needs by "invest[ing] in industry to develop enhanced configurations to support all [National Security Space] requirements." AR Tab 19 at 789. By comparison, the goal of the Phase 2 Procurement is to procure, through requirements contracts awards, "launch services." *Id.* at 786.

In addition—and perhaps more significantly—the administrative record makes clear that the LSA Competition did not involve the procurement of any goods or services by the Air Force. AR Tab 38 at 1261; *see also* Oral Arg. Tr. at 21:3-21:12. While it is undisputed that the Air Force will provide funding to develop launch service prototype vehicles under the LSAs, the Air Force will not purchase or own these prototypes. AR Tab 38 at 1261; Oral Arg. Tr. at 21:3-21:20. Nor will the Air Force acquire any services under the LSAs. AR Tab 38 at 1261; Oral Arg. Tr. at 21:15-21:16; 26:15-26:22. And so, unlike the Phase 2 Procurement, the LSA Competition did not involve an acquisition of goods or services.

Given the aforementioned differences between the LSA Competition and the Phase 2 Procurement, the record evidence supports the government's view that the evaluation and portfolio award decisions during the LSA Competition are distinct agency decisions that are not connected to the Phase 2 Procurement. *BayFirst Sols., LLC v. United States*, 104 Fed. Cl. 493, 507 (2012).

The Court is also not persuaded by SpaceX's arguments that the Court may consider its claims, notwithstanding the evidence showing that the LSA Competition and Phase 2 Procurement are distinct and separate solicitations.

First, SpaceX argues without persuasion that Tucker Act jurisdiction is established in this case, because the Air Force's portfolio award decision will impact the government's acquisition of launch services in the future. Pl. Resp. at 21-23. But, in *R&D Dynamics Corp. v. United States*, this Court recognized that the fact that resources expended by the government during one phase of a government program may lead to the development of the capacity to provide goods and services in the future does not, alone, render an award a "procurement." 80 Fed. Cl. 715, 722 (2007) (holding that a Phase II Small Business Innovation Research ("SBIR") award was not a procurement, and therefore the award could not be "in connection with" a Phase III procurement as contemplated by the Tucker Act). Similarly here, the fact

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that the development of prototype launch vehicles could eventually lead to the Air Force's acquisition of launch services is not sufficient, alone, to render the Air Force's decisions "in connection with" the Phase 2 Procurement in this case. *Id.*

SpaceX's argument that the LSA Competition must be "in connection with" the Phase 2 Procurement is also contradicted by the undisputed fact that the Phase 2 Procurement will be a fully open competition. Notably, the administrative record shows that the Phase 2 Procurement will be open to all interested offerors and that this procurement will not be limited to the three companies that have been awarded LSAs. AR Tab 19 at 786 ("FAR-based procurement contracts will be competitively awarded to certified EELV launch service providers, which could include companies that were not previously awarded ***445** LSAs"); *id.* at 807 ("[T]he Air Force intends to use a full and open competition to award FAR-based [firm-fixed priced] contracts to two launch providers for [National Security Space] launch service procurements ...").

During oral argument, SpaceX acknowledged that it will compete for the award of a launch services contract during the Phase 2 Procurement, even though SpaceX was not awarded a launch service agreement during the LSA Competition. Oral Arg. Tr. at 37:14-37:21. Given this, the record evidence makes clear that the Air Force's portfolio award decision during the LSA Competition will not dictate the outcome of the Phase 2 Procurement, as Space X suggests. Pl. Resp. at 23.

Indeed, while SpaceX raises understandable concerns that it may be disadvantaged in the future by the fact that the Air Force is funding the development of launch vehicle prototypes by Blue Origin, ULA and Orbital, such concerns involve a potential challenge to the *Phase 2 Procurement*—which is not the subject of this dispute. Oral Arg. Tr. at 37:5-37:8; 39:22-40:6. The Court also acknowledges that the question of whether the decisions made by the Air Force during the LSA Competition are "in connection with" the Phase 2 Procurement is a close one, given the evidentiary record in this case. But, the Court must answer this question based upon the totality of the record evidence and this evidence indicates that, while related, the LSA Competition and the Phase 2 Procurement are separate and distinct solicitations for the National Security Space Launch Program.

The Court also takes into consideration the intent expressed by Congress to remove the LSAs—which are not procurement contracts—from the legal requirements and process that govern procurement contracts. *See* 10 U.S.C. §§ 2731, 2731b; *see also* Def. Mot. at 6-7; Oral Arg. Tr. at 17:21-18:8. And so, for these reasons, the Court **GRANTS** the government's motion to dismiss this bid protest matter for lack of subject-matter jurisdiction. RCFC 12(b)(1).

Because the Court finds that the LSAs are not procurement contracts and that the Air Force's evaluation and portfolio award decisions during the LSA Competition are not "in connection with" the Phase 2 procurement, the Court does not reach the remaining jurisdictional issues raised in the government's motion to dismiss.

B. Transfer Of This Matter Is In The Interest Of Justice

As a final matter, the Court agrees with SpaceX that a transfer of this matter to the United States District Court for the Central District of California would be in the interest of justice. SpaceX requests that the Court transfer this matter to the United States District Court for the Central District of California, should the Court determine that it lacks subject-matter jurisdiction to consider its claims. Pl. Resp. at 37-39. Title 28, United States Code, section 1631 provides that the Court "shall" transfer an action to another federal court when: (1) the transferring court finds it lacks jurisdiction; (2) the proposed transferee court is one in which the case could have been brought at the time it was filed; and (3) the transfer is in the interest of justice. 28 U.S.C. § 1631; *see also Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.*, 525 F.3d 1299, 1303 (Fed. Cir. 2008). Each of these circumstances has been met here.

[8] First, SpaceX persuasively argues that the claims asserted in the complaint could have been brought in the United States District Court for the Central District of California at the time Space X commenced this action. Pl. Resp. at 37-38; *see also* 28 U.S.C. § 1391(b)(2) (stating that a civil action may be brought against the United States in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated"). SpaceX represents that its principal place of business is located within the Central District of California and that the Air Force office that made the evaluation and portfolio award decisions for the LSARFP is also located within that district. Pl. Resp. at 38. And so, Space X has shown that that the events giving rise to its claims occurred within in the Central District of California.

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SpaceX has also shown that it would be in the interest of justice to transfer this case to the district court. *See* Pl. Resp. at 38-39; *see* ***446** *also* *Galloway Farms, Inc. v. United States*, 834 F.2d 998, 1000 (Fed. Cir. 1987) (stating that "[t]he phrase 'if it is in the interest of justice' relates to claims which are nonfrivolous and as such should be decided on the merits (citing *Zinger Constr. Co. v. United States*, 753 F.2d 1053, 1055 (Fed. Cir. 1985)). SpaceX alleges nonfrivolous claims in this matter that the Air Force's evaluation and portfolio award decisions were unreasonable and in violation of federal law. Compl. at ¶¶ 101, 209. Specifically, SpaceX alleges, among other things, that the Air Force based the portfolio award decision on an arbitrary and unequal evaluation process and that the Air Force's portfolio award decision violates the assured access to space requirements mandated by Congress. *See* Compl. at ¶ 227. Given the non-frivolous nature of SpaceX's claims, the Court believes that SpaceX should be afforded the opportunity to pursue these claims in the district court. And so, the Court **GRANTS** SpaceX's motion to transfer venue to the United States District Court for the Central District of California.

V. CONCLUSION

In sum, the administrative record in this bid protest matter makes clear that the LSAs are not procurement contracts and that the Air Force's evaluation and portfolio award decisions during the LSA Competition were not "in connection with" the Phase 2 Procurement. Space X has also shown that it is in the interest of justice to transfer this matter to the United States District Court for the Central District of California. And so, for the foregoing reasons, the Court:

1. **GRANTS** the government's motion to dismiss;
2. **GRANTS** SpaceX's motion to transfer venue; and
3. **DISMISSES** the complaint.

The Clerk is directed to transfer the above captioned case to the United States District Court for the Central District of California.

Each party to bear its own costs.

The Clerk shall enter judgment accordingly.

Some of the information contained in this Memorandum Opinion and Order may be considered protected information subject to the Protective Order entered in this matter on May 22, 2019. This Memorandum Opinion and Order shall therefore be filed **UNDER SEAL**. The parties shall review the Memorandum Opinion and Order to determine whether, in their view, any information should be redacted in accordance with the terms of the Protective Order prior to publication.

The parties shall **FILE** a joint status report identifying the information, if any, that they contend should be redacted, together with an explanation of the basis for each proposed redaction, on or before **October 30, 2019**.

IT IS SO ORDERED.

All Citations

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United States District Court
Central District of California

SPACE EXPLORATION TECHNOLOGIES CORP.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant,

v.

BLUE ORIGIN, LLC, *et al.*,

Defendant-Intervenors.

Case № 2:19-cv-07927-ODW (GJSx)

ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT ON THE CERTIFIED ADMINISTRATIVE RECORD [170][215]

FINAL REDACTED VERSION 10/9/2020

I. INTRODUCTION

Before the Court is Space Exploration Technologies, Corp.'s ("SpaceX" or "Plaintiff") Motion for Judgment on the Certified Administrative Record, filed on December 10, 2019, challenging a final award decision made by the United States Air Force Space and Missiles Systems Center ("SMC" or "Agency"). (Mot., ECF No. 170.) SpaceX argues that SMC acted unlawfully, arbitrarily, and capriciously in awarding certain Launch Service Agreements ("LSAs") to Defendant-Intervenors Blue Origin,

LLC ("Blue Origin"), United Launch Services, LLC ("ULS"[1] or "ULA"), and Orbital Sciences Corporation ("Orbital") (collectively along with Plaintiff, "Offerors"). (Mot. 6, 20.) The Motion has gone through multiple rounds of briefing,[2] and the Court heard argument from the Parties on June 19, 2020.

Paraphrasing Dr. Leonard McCoy, "I'm a Judge, not a rocket scientist." The Court's role is not to second-guess the Agency's technical reasoning, but rather to consider whether SMC sufficiently identified its needs and provided a rational explanation for its award decision. SpaceX may be the revolutionary leader in space technology, as it repeatedly claims in its papers. Still, it had the sole responsibility to craft its LSA proposal with due consideration for the Agency's stated needs and mission, no matter how limited those needs may have been compared to SpaceX's ambitious vision. For the following reasons, the Court **DENIES** SpaceX's Motion.

II. BACKGROUND

A. Historical Context

The National Security Space Launch Program ("NSSL Program")—previously known as the Evolved Expendable Launch Vehicle Program ("EELV Program")[3]—is charged with "procuring launch services to meet national security space (NSS) launch requirements." (Certified Administrative Record ("AR") Tab 19, 786, filed under seal, ECF No. 204.) Among other things, the NSSL Program is vital to the delivery of satellites that serve as "the nation's eyes and ears." (*See* AR Tab 19, 786 (describing the role of NSS satellites in secure communications and GPS systems, weather imaging, and warfighting).)

For over 20 years, the United States has been trying to cease using Russian-made

[1] The ULS is a subsidiary of United Launch Alliance ("ULA"). The Parties refer to that Intervenor interchangeably as ULS and ULA. The Court will refer to it as "ULA."

[2] There is significant duplication in the arguments raised by the Government and Intervenors. The Court will mostly cite to the Government's arguments without cross citations.

[3] Congress renamed the EELV Program in the National Defense Authorization Act ("NDAA") of 2019. Pub. L. No. 115-232, § 1603(b), 132 Stat. 1636, 2105 (2018).

rocket engines for national security reasons. *Hr'g on Mil. Space Launch & the Use of Russian-Made Rocket Engines Before the Senate Comm. on Armed Servs.*, 114th Cong. 2–3 (2016) (opening statements of Sen. John McCain, Chairman), https://fas.org/irp/congress/2016_hr/engines.pdf. This goal has been plagued by significant inaction and delays. *See id.* at 2 ("Yet 20 years later, after numerous stalling efforts rooted in corporate greed and naïve assertions of defense cooperation with Russia, little progress has been made in limiting the influence of Russia on space launch."). Notwithstanding these obstacles, Congress remains committed to "transition from the use of non-allied space launch engines to a domestic alternative" for delivering NSS payloads into space. NDAA of 2015, Pub. L. No. 113-291, § 1604(a)(1), 128 Stat. 3292, 3623 (2014).

In 2011, SMC crafted a multi-phase strategy to comply with Congress's directive. (*See* AR Tab 19, 787.) In the LSA Phase in question, SMC sought to "increase the pool of launch vehicles that meet the Air Force's needs by 'invest[ing] in industry to develop enhanced configurations to support all [National Security Space] requirements.'" *Space Expl. Techs. Corp. v. United States*, 144 Fed. Cl. 433, 444 (2019) (quoting AR Tab 19, 789). In other words, the purpose of the LSA Phase was not to acquire any goods or services, but instead to foster a competitive field in preparation for Phase 2 in which SMC would procure launch services. *Id.* (citing AR Tab 19, 786; AR Tab 38, 1261).

B. The LSA Request for Proposals

On October 5, 2017, pursuant to its authority to enter into "other transactions" agreements ("OTs"),[4] SMC issued a Request for Proposals ("RFP") related to the LSAs

[4] OTs are agreements that are not procurement contracts, cooperative agreements, or grants and thus are not required to comply with the Federal Acquisition Regulation ("FAR"). *See* 10 U.S.C. § 2371(a); 32 C.F.R. § 3.2. The Department of Defense may use OTs to "carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces." 10 U.S.C. § 2371b(a)(1). "To the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out the prototype projects under subsection (a)." 10 U.S.C. § 2371b(b)(2).

in question. (AR Tab 38, 1256.) SMC amended the RFP three times in early 2018. (AR Tab 38, 1256.) According to SMC, the RFP "continue[d] the [NSSL Program's] strategy to quickly transition from the use of non-allied space launch engines, implement sustainable competition for [NSS] launch services, and maintain assured access to space as required by [Congress]." (AR Tab 38, 1260.) Specifically, SMC's strategy involved leveraging commercial launch solutions to secure at least two domestic, commercial launch service providers that meet NSS requirements. (AR Tab 38, 1260.)

SMC sought proposals for two payload categories: (1) Category A/B missions, which comprise the majority of the NSS launches and constitute the most imminent need; and (2) Category C missions, which will carry the heaviest payloads. (AR Tab 38, 1261, 1286, 1288.) The need dates for Category A/B missions were April 1, 2022 (for launches from the east or west coast) and October 1, 2024 (for launches from the west coast). (AR Tab 38, 1284, 1288.) The need dates for Category C were September 1, 2025 (tentative) for the Polar 2 mission and October 1, 2026 (firm) for the GEO 2 mission. (AR Tab 38, 1288.)

SMC evaluated the Offerors' proposals based on three main criteria, including EELV Approach, Technical, and Investment Cost. (AR Tab 38, 1262, 1281–85.) The second factor was divided into two subfactors; Design and Schedule. (AR Tab 38, 1281.) Under the EELV Approach factor, SMC evaluated whether the Offerors' development and qualification approaches met the launch system requirements. (AR Tab 38, 1281–83.) The Design subfactor assessed the risks associated with the Offerors' designs of their launch vehicles' booster systems and upper stages. (AR Tab 38, 1283–84.) The Schedule subfactor evaluated the risk that the Offerors' proposals would be unable to meet the required need dates. (AR Tab 38, 1284.) Finally, under the Investment Cost factor, SMC evaluated the Offerors' proposed costs, including the total investments by the Government, private industry, and the Offerors themselves. (AR Tab 38, 1284.)

Using these evaluation factors, SMC set out to choose the portfolio of solutions that was "most advantageous in achieving the Government's goal of assured access to space via two or more domestic commercial launch providers that also meet NSS requirements." (AR Tab 38, 1285.) The Government's stated preference was for a portfolio containing at least three LSAs. (AR Tab 38, 1285.)

C. The LSA Competition

SpaceX and the Intervenors were the only companies that competed for the LSAs. (AR Tab 132, 41419.) SpaceX proposed a family of launch vehicles, including its NSS-certified Falcon 9, NSS-certified Falcon Heavy, and Starship (formerly known as the Big Falcon Rocket or "BFR"). (AR Tab 132, 41421.) SpaceX proposed these three vehicles for the Category A/B missions and the third only for the Category C missions. (AR Tab 132, 41579.)

ULA proposed its Vulcan Centaur Launch System powered by a booster engine, BE-4, that is made by Blue Origin. (AR Tab 132, 41420.) Blue Origin proposed its New Glenn vehicle powered by its own BE-4 engine. (AR Tab 132, 41420.) Finally, Orbital proposed its OmegA vehicle powered by Aerojet Rocketdyne engines. (AR Tab 132, 41421.)

D. SMC's LSA Award Decision

On October 9, 2018, SMC awarded LSAs to ULA for $967 million, Orbital for $792 million, and Blue Origin for $500 million. (AR Tab 135, 41732; AR Tab 136, 41752–53.) SMC rated ULA's proposal the highest for having an outstanding approach, low risk, and reasonable costs. (AR Tab 136, 41753.) SMC determined that Orbital's proposal had a good approach with mostly low risk at a reasonable cost. (AR Tab 136, 41753.) Although SMC concluded that Blue Origin had an outstanding approach at a reasonable cost, it suffered from moderate risk that would need to be monitored. (AR Tab 136, 41753.) On the other hand, SMC did not award an LSA to SpaceX because SMC concluded that SpaceX's "outstanding technical approach" was offset by the risks in its approach and schedule. (AR Tab 136, 41753.) In addition, SMC noted that

SpaceX's innovative approach was the costliest in terms of Government investment and overall total cost. (AR Tab 136, 41753.)

SpaceX moves the Court to: (1) "declare the LSA award decision arbitrary, capricious, and unlawful;" (2) "award SpaceX an appropriate LSA or enjoin any further investment [and performance] under the LSAs;" (3) in the alternative, "direct the [SMC] to reevaluate the LSA proposals" or "revise the RFP to reflect the [SMC]'s actual needs, reopen the competition, and make a new LSA award decision;" and (4) "provide such other relief as the Court deems just and appropriate." (Notice of Mot. & Mot. 1–2, ECF No. 170.)

III. STANDARD OF REVIEW

Section 706(2)(A) of the Administrative Procedure Act ("APA") requires a reviewing court to uphold agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this standard, courts will "sustain an agency action if the agency has articulated a rational connection between the facts found and the conclusions made." *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005). In determining whether an agency determination violated the APA, courts must focus their review on the administrative record, "not some new record made initially in the reviewing court." *Jet Inv., Inc. v. Dep't of the Army*, 84 F.3d 1137, 1139 (9th Cir. 1996) (internal quotation marks omitted).

The arbitrary or capricious standard is a deferential standard of review under which the agency's action carries a presumption of regularity. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971), *abrogated in part on other grounds as recognized in Califano v. Sanders*, 430 U.S. 99 (1977); *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). Although the court's inquiry must be "searching and careful, . . . the ultimate standard of review is a narrow one." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (internal quotation marks omitted). Thus, "[e]ven when an agency explains its decision with less than ideal

clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned." *Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 497 (2004) (internal quotation marks omitted). It is not the reviewing court's task to "make its own judgment about" the appropriate outcome. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010). "Congress has delegated that responsibility to the [agency]." *Id*. "The court's responsibility is narrower: to determine whether" the agency complied with the APA. *Id*.

This traditional deference to the agency is at its highest where a court is reviewing an agency action that required a high level of technical expertise. *Marsh*, 490 U.S. at 377; *see also Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."). As part of this deference, courts afford the agency discretion to choose among scientific models and "reject an agency's choice of a scientific model only when the model bears no rational relationship to the characteristics of the data to which it is applied." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 621 (9th Cir. 2014) (internal quotation marks omitted).

Nevertheless, the deference owed to agencies is not unlimited. Courts may not automatically defer to an agency's conclusions, even when those conclusions are scientific. *See Marsh*, 490 U.S. at 378. Rather, a court's review must be sufficiently probing to ensure that the agency has not:

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). A different approach "would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that

agency decisions are founded on a reasoned evaluation of the relevant factors." *Marsh*, 490 U.S. at 378 (internal quotation marks omitted).

IV. DISCUSSION

SpaceX accuses SMC of an uncompetitive scheme to serve the needs of ULA, the company that, allegedly, formerly monopolized the commercial space industry. (Mot. 1–2, 5, 19.) SpaceX notes that the two other Intervenors, Blue Origin and Orbital, are currently developing major components for ULA's new rocket. (Mot. 5.) Thus, SpaceX believes that, in choosing to award the three LSAs to ULA and its two business partners, SMC was simply "subsidizing the development of a new launch system offered by ULA." (Mot. 5.)[5]

SpaceX makes three principal arguments for why the Court should grant it judgment, including that: (1) SMC violated the RFP and Congressional direction; (2) SMC's cost evaluations were anticompetitive and irrational; and (3) SMC's risk assessments were anticompetitive and irrational. (*See* Mot. 17–35.) To avoid duplicative analysis, the Court will begin by addressing the latter. However, as a preliminary matter, Blue Origin argues that SpaceX has failed to comply with the legal standard governing the Motion, which required SpaceX to have challenged and appealed the "final" agency action. (*See* Blue Origin Opp'n 8, ECF No. 179.) Accordingly, before addressing the merits of SpaceX's arguments, the Court will address Blue Origin's threshold argument.

A. Final Agency Action

APA claims must address "'final agency action for which there is no other adequate remedy in court.'" *Rattlesnake Coal. v. U.S. E.P.A.*, 509 F.3d 1095, 1103 (9th Cir. 2007) (quoting 5 U.S.C. § 704). An agency action is "final" under the APA

[5] The Court declines SpaceX's invitation to question the Agency's true motives. The Supreme Court has cautioned that judicial inquiry into "executive motivation represents a substantial intrusion into the workings of another branch of Government and should normally be avoided." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (internal quotation marks omitted). In addition, SpaceX ignores that SMC has outlined other rational explanations for its portfolio decisions.

when "(1) the agency reaches the 'consummation' of its decisionmaking process and (2) the action determines the 'rights and obligations' of the parties or is one from which 'legal consequences will flow.'" *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

Blue Origin argues that the Court cannot review the agency action that SpaceX objects to because it does not constitute a reviewable final decision. (*See* Blue Origin Opp'n 11.) Instead, Blue Origin contends that SpaceX should have focused on addressing the Agreements Officer's ("AO") decision, which rejected SpaceX's administrative objections. (*See* Blue Origin Opp'n 10.) SpaceX responds that the decision in question is a final action because it was not tentative or interlocutory and had direct and appreciable legal consequences. (Reply 5, ECF No. 182.) SpaceX also argues that the RFP is neither a statute nor regulation mandating exhaustion. (Reply 6.)

Although somewhat persuasive, Blue Origin's argument ultimately fails because it relies on the unsupported conclusions that the RFP's appeal provision was mandatory and that the AO reviewed SpaceX's objections de novo. Contrary to Blue Origin's contentions, section 1.4 of the RFP does not expressly require administrative exhaustion before judicial review. *See Darby v. Cisneros*, 509 U.S. 137, 154 (1993) (holding that exhaustion is only required where expressly required by statute or an agency rule). Instead, section 1.4 merely sets forth the requirements that the Offerors had to follow if they wished to present an objection to the AO. *Compare* (AR Tab 35, 1068 (RFP section 1.4)) *with Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002) (citing 7 U.S.C. § 6912(e) which specifically requires "[e]xhaustion of administrative appeals").

Blue Origin's strongest argument is that SMC's initial decisions became nonfinal when SpaceX opted to seek the AO's reconsideration. (*See* Blue Origin Sur-Reply 7, ECF No. 191 (quoting *ICC v. Locomotive Eng'rs*, 482 U.S. 270 (1987)).) But the cases that Blue Origin cites involved de novo administrative appeals. Here, Blue Origin fails to support its claim that the AO reviewed the matter de novo in considering SpaceX's

objections. Indeed, the Court cannot find any indication in the RFP or the AO's record that the AO's review was de novo. Instead, it appears that the AO simply affirmed SMC's analysis after finding that SpaceX's objections lacked merit. (*See* AR Tab 152, 43100.) The fact that the AO issued its decision in a mere six pages, compared to SMC's thousands of pages of analysis, further undermines Blue Origin's claim. Indeed, if limited to the AO's summary dismissal of SpaceX's objections, the Court would be hard-pressed to carry out its duty to review the Government's award decisions.

Accordingly, the Court rejects Blue Origin's threshold argument and proceeds to consider SpaceX's objections.

B. SMC's Risk Assessments

SpaceX argues that SMC's risk assessments violated statutory mandates and the principles of fair play, thus constituting an abuse of discretion. (Mot. 24–25 (quoting *Dubinsky v. United States*, 43 Fed. Cl. 243, 259 (1999)).) First, SpaceX argues that SMC improperly negated risks in the Intervenors' proposals for the Category A/B missions. (Mot. 25.) Second, SpaceX contends that SMC's risk assessments were anticompetitive because it assigned a "high risk" to SpaceX's Category C solution based on unstated criteria that deviated from the RFP. (Mot. 29.) Lastly, SpaceX argues that SMC arbitrarily concluded that SpaceX's Category C solution would not meet the RFP need date. (Mot. 31.)

1. SMC's Category A/B Mission Risk Assessments

SpaceX asserts that SMC wrongly negated schedule risks created by the Intervenors' proposals to its Category A/B missions. (Mot. 25.) According to SpaceX, the RFP did not advise the Offerors that SMC deemed these risks less critical to assured access to space or that it would excuse offeror risk based on an unstated backup plan.

(Mot. 25.) SpaceX argues that it would have proposed differently had it known that Category C mission risks would drive SMC's LSA decisions. (Mot. 25.)[6]

"Schedule risks" refer to the Offerors' ability to: (1) launch Category A/B payloads from either the east or west coast by April 1, 2022 ("Criteria 1"); (2) launch Category A/B payloads from the west coast by October 1, 2024 ("Criteria 2"); and (3) launch Category C payloads to a specific orbit, Polar 2, by September 1, 2025 ("Criteria 3"). (*See* AR Tab 132, 41427.) In evaluating schedule risk, SMC considered, among other things, the proposals' margin of time between final certification flight and the Criteria need dates (hereinafter, "Final Certification Margin"). (*See, e.g.*, AR Tab 132, 41618.) The purpose of this time period was to allow the Government to assess the prototype for any remaining issues and make necessary repairs or design changes. (*See* AR Tab 132, 41457 (noting that, on average, it takes the Government two months to conduct its post-flight analysis).)

SpaceX's arguments fail for several reasons. Most importantly, SpaceX incorrectly claims that SMC *requires* a Final Certification Margin benchmark of 14 months to achieve a "low risk" schedule rating. (Mot. 26.) SpaceX emphasizes it was the only Offeror that proposed a Final Certification Margin longer than 14 months. Although the Government admits that the 14-month benchmark is a historical predictor for low risk, it argues that the benchmark is merely a *guideline* subject to deviation depending on the special circumstances of a particular project. (U.S. Opp'n 11, ECF No. 177.) Indeed, the evidence which SpaceX claims supports its argument actually undermines it. (*See* AR Tab 135, 41725 (referring to the 14-month Final Certification Margin as only "*typical* of a low risk schedule" (emphasis added)).)

Although SMC did not require a 14-month Final Certification Margin to qualify for a low risk rating, it did carefully consider that benchmark in evaluating the Offerors'

[6] To begin, the Court finds no support in the record for SpaceX's conclusory argument that SMC assigned more weight to the Category C missions. (*See, e.g.*, AR Tab 38, 1282–86.) Accordingly, the Court will only consider SpaceX's other arguments.

proposals. For instance, with respect to ULA, far from "negat[ing] the impact of risk to the Category A/B missions" as SpaceX argues, SMC acknowledged that ULA's proposed [redacted]. (*See* AR Tab 132, 41457 [redacted] Nevertheless, SMC concluded that [redacted] (*See* AR Tab 132, 41457.) Indeed, SMC noted [redacted] (*See* AR Tab 132, 41457; AR Tab 135, 41720–21; ULA Opp'n 18, ECF No. 180 (citing AR Tab 38, 1282).)

SMC also carefully considered Orbital's and Blue Origin's divergence from the 14-month benchmark, which ultimately hurt both of their schedule risk scores. (*See* AR Tab 132, 41510 (classifying Blue Origin's Final Certification Margin of [redacted] as a [redacted]), 41555 (classifying Orbital's Final Certification Margin of [redacted] as a [redacted]).) In addition, contrary to SpaceX's argument, (*see* Mot. 27), SMC did consider the Intervenors' development experience in determining their risk ratings. For instance, SMC classified the fact that Orbital had never developed an EELV class launch vehicle as a "significant weakness" and gave Blue Origin a [redacted] than ULA—despite Blue Origin's better Final Certification Margin of [redacted]—because of [redacted]. (AR Tab 132, 41510–14 [redacted], 41555–58 (finding that Orbital's experience did not justify a [redacted] Final Certification Margin).)

Nevertheless, SpaceX argues that SMC assessed a lower risk to Blue Origin and Orbital because SMC had a backup plan to use SpaceX's or ULA's Russian-powered solutions in the event Blue Origin's and Orbital's proposals failed. (*See* Mot. 25.) The Government argues that no such backup plan was considered in evaluating the Intervenors' schedule risk. (U.S. Opp'n 15.) Although no such plan is mentioned in

key evaluation documents,[7] there is evidence that SMC considered this option in arriving at its ratings. (*See* AR Tab 101, LSA Conversation with Orbital on Rating 33:10–36:00; AR Tab 101, LSA Conversation with Blue Origin on Rating 24:40–28:20; AR Tab 101, LSA Conversation with ULA on Rating 39:45–42:27.) However, the Court is not persuaded that SMC acted arbitrarily or capriciously in buying down some of the Intervenors' risks based on this backup plan, even if unstated. *See Dep't of Commerce*, 139 S. Ct. at 2573 ("[A] court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons."). That SMC was willing to fall back on SpaceX's proposal if absolutely necessary does not mean that SpaceX's proposal should have been selected, as SpaceX appears to argue.

Finally, the Government and Intervenors argue that in attacking the Intervenors' schedule risk ratings, SpaceX minimized its own schedule risks. (U.S. Opp'n 13; ULA Opp'n 28.) The Court agrees. Specifically, SpaceX ignores that it had yet to develop the vertical integration capability[8] required for Category A/B launches. (U.S. Opp'n 13 (citing AR Tab 132, 41584).) SMC found this to be a weakness, albeit one that could be managed through "[s]pecial Participant emphasis and close Government monitoring." (AR Tab 132, 41616.) However, SpaceX argues that SMC erred in ignoring SpaceX's offer to begin the vertical integration project earlier. (Mot. 28 n.13 (citing AR Tab 123, 39864).) But that offer came with conditions—only if a clear mission need arose or enough funding became available—which SMC was within its discretion to refuse. (*See* AR Tab 123, 39864.) SpaceX also argues that its Final

[7] For instance, the backup plan is not mentioned in the documents prepared by the AO and Evaluation Team Chairperson, (U.S. Opp'n 15 (citing AR Tab 132, 41413–41660)), the Source Selection Authority Award Briefing document, (U.S. Opp'n 15 (citing AR Tab 134, 41664–41713)), Portfolio Recommendation document, (U.S. Opp'n 15 (citing AR Tab 135, 41714–44)), or the award decision itself, (U.S. Opp'n 15 (citing AR Tab 136, 41745–53)).

[8] According to the Government, "vertical integration" refers to the launch system's ability to "maintain the EELV Primary Payload in the Vertical Orientation for all operations until Liftoff." (AR Tab 18, 757.) ULA states that vertical integration is necessary to protect sensitive NSS satellites. (ULA Opp'n 10.)

Certification Margin was actually [redacted] months when measured according to the Air Force's east coast vertical integration need date, rather than the RFP need date. (Mot. 28 n.13 (citing AR Tab 132, 41615).) However, SMC was right to rely on the official RFP dates, known to the Offerors, as opposed to the Air Force's tentative plan to push an east coast launch requiring vertical integration until late 2023.

In sum, SMC's risk determinations concerning the Category A/B missions were rational considering the administrative record. SMC's decisions deserve substantial deference given the high-level technical expertise required to assess the proposals' risks. *See Marsh*, 490 U.S. at 377. Accordingly, the Court rejects SpaceX's arguments that SMC acted arbitrarily and capriciously in assessing the Offerors' risks to the Category A/B missions.

2. SpaceX's High-Risk Schedule Rating for Category C Missions

Next, SpaceX argues that SMC's risk assessment process was anticompetitive because it graded SpaceX's Category C solution based on unstated criteria that deviated from the RFP. (Mot. 29.) SpaceX offers two main arguments in support of its position.

First, SpaceX contends that SMC erred in deeming SpaceX's Category C solution incomplete simply because it was not tailored to the Government's current Category C payload processing procedures ("CONOPs"), which use Government facilities and processes. (Mot. 29.) SpaceX argues that the RFP did not direct the Offerors to process Category C payloads in specifically-designed and tailored Government facilities or to incorporate the Government's CONOPs into their proposals. (Mot. 29.) The RFP also did not warn the Offerors that changing current processes might result in an incomplete rating. (Mot. 29.) SpaceX argues that if SMC considered its specifically designed and tailored CONOPs and infrastructure to be critical for a complete launch solution, then SMC had an obligation to amend the RFP to say so. (Mot. 29–30.) Had SMC amended the RFP in this way, SpaceX claims that it would have proposed differently. (Mot. 30.)

To start, SpaceX's argument is flawed because SMC did not actually deem SpaceX's proposal to be incomplete. Had SMC intended to do so, it would have stated

that the proposal had a "deficiency," which is a material failure to meet an RFP requirement. (*See* AR Tab 135, 41716 (defining different technical ratings, including "weakness," "significant weakness," "deficiency," and "strength").) Instead, SMC found SpaceX's proposal to have a "significant weakness," which is a "flaw that appreciably increases the risk of unsuccessful agreement performance." (AR Tab 132, 41585; AR Tab 135, 41716.)

Moreover, SMC denies that SpaceX's rating was based merely on its decision not to use existing CONOPs. (*See* U.S. Opp'n 17.) Instead, SMC was concerned about the significant accommodations and costs it would take to implement SpaceX's approach, not to mention the risks that would arise from it. At the time, the Government processed Category C payloads in a specifically designed and tailored Government facility. (AR Tab 132, 41586.) SMC found that SpaceX's proposal [redacted] (AR Tab 132, 41586.) Although SMC's technical analysis deserves great deference, SpaceX's argues that SMC should have amended the RFP to clarify its preference for existing CONOPs.

This is SpaceX's most persuasive argument, and resolving this issue is a close call. "[M]aking offerors aware of the rules of the game in which they seek to participate is fundamental to fairness and open competition." *Dubinsky*, 43 Fed. Cl. at 259. Ultimately, though, the Court agrees that it would have been impossible and unreasonable for SMC to foresee every single potential risk that could arise from the Offerors' proposals. (*See* Sealed Joint Resps. to Ct. Questions ("Joint Resps.") 2–3, ECF No. 210 ("The Air Force was soliciting new and innovative systems: it could not prejudge the risks of those proposals in the abstract before it saw the specific technical proposals the offerors advanced.")); *QualMed, Inc.*, 73 Comp. Gen. 235, 235 (1994) ("Although solicitations must provide sufficient information to enable offerors to

compete intelligently and on an equal basis, they are not required to disclose . . . the precise details of the proposal evaluation process.").[9] In addition, SpaceX was on notice about SMC's concerns before it submitted its final proposal. (*See* AR Tab 108, 31838 ("[A]ccommodat[ing] these changes [to current Government CONOPs] increases the risk of cost increases, schedule delays and performance degradation . . . ."); AR Tab 119d, 35186 ("If [SpaceX's] response during negotiations remains in the Final Proposal, this significant weakness would remain.").) The Court is not persuaded that SpaceX had no expectation that its proposal would suffer based on its substantial deviation from established practices.

Second, SpaceX argues that SMC also erred in criticizing SpaceX's proposal to launch the Category C Polar 2 mission from the east coast. (Mot. 30.) SpaceX notes that in Amendment 2, SMC removed any requirement to launch that mission from the west coast. (Mot. 30 (citing AR Tab 37, 1246 & AR Tab 38, 1284).) SpaceX claims that it would have proposed to launch Category C missions from the west coast had it known that SMC required that. (Mot. 30.) SpaceX also argues that it actually committed to consider several alternatives to satisfy the NSS requirements, including launching from the western range. (Mot. 31 (quoting AR Tab 123, 39987–88).)

The Government admits that the RFP did not require Category C missions to be launched from the west coast. (U.S. Opp'n 18.) Nevertheless, SMC determined that SpaceX's "East Coast infrastructure could be insufficient to support the [east coast] Polar-based orbits, thus resulting in duplication of West Coast launch infrastructure on the East Coast." (AR Tab 132, 41588.) Because of this issue, SMC was concerned about the potential impact to cost and schedule. (*See* AR Tab 132, 41588.)

[9] Although not binding, protest decisions by the Government Accountability Office ("GAO") are accorded great deference by courts. *See NCR Corp. v. United States*, No. 89-1454, 1990 WL 135887, at *1 (Fed. Cir. Sept. 20, 1990) ("In view of the Comptroller General's long and extensive experience in the resolution of contested procurement decisions, his holdings are entitled to great deference."); *Glenn Def. Marine (Asia), PTE Ltd. v. United States*, 97 Fed. Cl. 568, 577 n.17 (2011) (citing cases for the proposition that GAO decisions may be considered expert opinion).

Again, the Court is not convinced that SpaceX had no clue that its proposal might create more risk than an alternative that launched the Category C Polar 2 mission from the west coast. On the contrary, SpaceX knew that SMC had initially required a west coast launch. (*See* AR Tab 37, 1252.) Although SMC eventually allowed east coast launches, SpaceX was on notice that such proposals might face additional scrutiny. Specifically, SMC noted that:

> This change recognizes the *potential* path out to a Polar orbit out of [the east coast] and indicates that the Government will *consider the risk on schedule* of a Category C launch solution, *without specifying which coast the launch solution must concern*. The fact that a pathway to Polar orbit is possible from [the east coast] is a *new approach* . . . . The Government will evaluate each offeror's specific approach, make an integrated assessment, and *assign an appropriate risk rating under the Schedule Factor*.

(AR Tab 37, 1252–53 (emphases added).) Further, SMC informed SpaceX of its concerns multiple times to no avail. (*See, e.g.*, AR Tab 92, 29528–59 (asking SpaceX to explain how it would manage the risk of its "unproven approach" to launch from the east coast).)

For these reasons, the Court rejects SpaceX's argument that SMC improperly graded its Category C solution based on unstated criteria that deviated from the RFP.

3. SMC's Conclusion That SpaceX's Category C Solution ("Starship") Would not Meet the RFP Need Date

SpaceX argues that SMC arbitrarily found a significant likelihood that SpaceX's Category C proposal would not meet the RFP need date. (Mot. 31 (quoting AR Tab 136, 41753).) SpaceX disagrees with SMC's conclusions regarding (1) [redacted] for the Starship's third certification flight, (2) the timing for testing the functionality of the Starship design, and (3) the Starship's completion date.

First, SpaceX contends that SMC improperly concluded that the third certification flight for its Starship would require [redacted] (Mot. 31

(quoting AR Tab 132, 41620–21).) In other words, SMC determined that SpaceX's proposal relied on successful [redacted] part of the launch system, [redacted] But SpaceX argues that its proposal stated the opposite. (Mot. 31.) In response, the Government provides additional detail about SMC's concerns with SpaceX's solution.

SMC acknowledged that SpaceX's Category C proposal was "truly revolutionary," yet it proved to be too revolutionary for SMC. (U.S. Opp'n 19–20.) SMC concluded that, while SpaceX's "proposed capabilities [were] exquisite, representing extraordinary opportunity for advancement of NSS capabilities," they came at "extraordinary cost, technical, and schedule risk." (AR Tab 132, 41651.)

In particular, SMC found that SpaceX's novel plan to [redacted] (*See* AR Tab 132, 41603–04, 41608–09, 41621.) Contrary to SpaceX's position that such [redacted] would require only minor configuration changes, SMC determined that transitioning to an [redacted] approach would require substantial design changes to the machine's [redacted] baseline. (*See* U.S. Opp'n 20 (quoting AR Tab 132, 41620).) In addition, even if the alternative [redacted] version was used, SMC was concerned about the technical challenges that would arise from relying on the machine's [redacted] baseline. (*See* AR Tab 132, 41620 [redacted] The Court does not second-guess SMC's reasoned technical determinations. *See Marsh*, 490 U.S. at 377.

Second, SpaceX argues that SMC erred in concluding that SpaceX would not test the functionality of the Starship design until "very late in the development." (Mot. 32.) SpaceX notes that it offered a [redacted]-month Final Certification Margin for Category C, which far surpassed SMC's 14-month benchmark as well as the margins offered by the

Intervenors for Category A/B missions. (Mot. 32.)

The Government explains that SpaceX's Final Certification Margin was insufficient for several reasons. Again, SMC was wary of SpaceX's revolutionary proposal and determined that it "stresse[d] the state of the art" in at least five different areas. (AR Tab 132, 41620.) Notwithstanding a delay due to any one of these five areas, SMC further concluded that "[c]ombining all of these state of the art approaches into one prototype significantly increase[d] the risk of delay for a working prototype." (AR Tab 132, 41620.) Because of the magnitude of risk created by SpaceX's innovative proposal, it was not irrational for SMC to deviate, this time upwards, from its 14-month historical benchmark. In fact, SMC would have violated the APA had it *not* addressed the Starship's significant technological risks. *See Motor Vehicle Mfrs.*, 463 U.S. at 43 (holding that courts must ensure the agency did not "entirely fail[] to consider an important aspect of the problem").

SpaceX complains that SMC magnified the errors in its evaluation by unfairly favoring ULA's and Blue Origin's Category C proposals. With respect to ULA, SpaceX contends that SMC made a mistake in calculating ULA's Final Certification Margin for Category C by ignoring that ULA's solution depended on the development of the [redacted]. (Mot. 32.) The Government and ULA respond, however, that SpaceX misreads ULA's proposal, which proposes the [redacted] rather than the [redacted], [redacted] (U.S. Opp'n 23; ULA Opp'n 32 n.16.)

The record includes evidence supporting both theories. (*Compare* AR Tab 120, 35217–18 (stating that ULA is offering the [redacted] to satisfy Category A/B mission requirements and [redacted] to satisfy Category C mission requirements) *with* AR Tab 120, 35255 (listing [redacted] In response to the Court's written questions regarding this apparent conflict, the Parties clarified their respective positions. (*See* Joint Resps. 23–26.) According to

the Government and ULA, under ULA's proposed two-step development plan for its [redacted] was ready to take over. (*See* Joint Resps. 24.) Thus, they argue that SMC reasonably calculated ULA's Final Certification Margin based on the availability of [redacted]. (*See* Joint Resps. 24–25.) In response, SpaceX complains that ULA should have clarified this proposal in its schedule narrative or Category C schedule. (*See* Joint Resps. 25.)

SpaceX's argument is unconvincing. Even if ULA erred in ensuring that its Category C schedule accurately represented its two-step proposal, SpaceX offers no legal basis to strip SMC of the authority to rely on its understanding of ULA's actual proposal. As the Court noted, there is evidence in the record from which SMC could have plausibly concluded that ULA intended to rely on the [redacted] such that SMC's reasoning "may reasonably be discerned." *Alaska Dep't of Env't Conservation*, 540 U.S. at 497.

As for Blue Origin, the Government contends that SpaceX is comparing apples to oranges because Blue Origin's proposal was "simpler, less novel, and more mature" than SpaceX's. (U.S. Opp'n 23 (citing AR Tab 132, 41650–51).) According to the record, Blue Origin's proposal had a technological readiness level ("TRL")[10] [redacted], compared to SpaceX's level [redacted] (AR Tab 132, 41650–51.) Thus, even if SpaceX's and Blue Origin's proposals were at similar [redacted] stages of development, SMC reasonably concluded that Blue Origin's solution was less risky with respect to Criteria 3. *See Marsh*, 490 U.S. at 377 (discussing that courts must generally defer to agency on actions involving a high level of technical expertise).

Third, SpaceX argues that SMC improperly concluded that SpaceX's Starship would not complete development until 2026, rendering it late for the tentative

[10] TRL measures the maturity level of a particular technology. TRL 1 is the lowest and TRL 9 is the highest level possible. Thuy Mai, *Technology Readiness Level*, NASA (last updated Aug. 7, 2017), https://www.nasa.gov/directorates/heo/scan/engineering/technology/txt_accordion1.html (last visited August 20, 2020).

September 1, 2025 Category C need date. (Mot. 33.) SMC based this finding on the eleven years NASA took to develop the Space Shuttle. (Mot. 33.) According to SpaceX, SMC's analogy to the Space Shuttle was improper because (1) SpaceX uses technology that did not exist in the 1970s, (2) the Starship configuration is simpler than that of the Space Shuttle, (3) SpaceX has a proven record of developing launch vehicles in less than half of that time, and (4) SpaceX develops all major systems in house as opposed to relying on subcontractors, which saves time. (Mot. 33.) Because of these differences, SpaceX argues that SMC's comparison to the Space Shuttle was arbitrary and capricious. (Mot. 34.)

As an initial matter, the Government objects to SpaceX's reliance on the declaration of [redacted], SpaceX's vice president of customer operations and integration, and urges the Court to limit its review to the administrative record. (U.S. Opp'n 23 (quoting *San Luis*, 776 F.3d at 992).)[11] "In general, a court reviewing agency action under the APA must limit its review to the administrative record." *San Luis*, 776 F.3d at 992. A narrow exception exists when the extra-record evidence is "necessary to determine whether the agency has considered all relevant factors and has explained its decision." *Id.* (internal quotation marks omitted). But the exception does not apply "[w]here the record contains sufficient information to explain how the agency used the information before it and why it reached its decision." *Forestkeeper v. La Price*, 270 F. Supp. 3d 1182, 1228 (E.D. Cal. 2017) (internal quotation marks and alterations omitted). If the Court does consider the extra-record evidence, it must do so only "to develop a background against which it can evaluate the integrity of the agency's analysis [because] the exception does not permit district courts to use extra-record evidence to judge the wisdom of the agency's action." *San Luis*, 776 F.3d at 993.

SpaceX argues that its declaration is admissible because it shows material

[11] Blue Origin also filed formal evidentiary objections to the [redacted] declaration. (Blue Origin Evid. Objs., ECF No. 179-2.) The Court considers Blue Origin's objections only to the extent it might rely on certain parts of [redacted] declaration. All other objections are **OVERRULED as moot**.

differences between its proposal and the Space Shuttle development that SMC ignored. (Reply 22.) However, SMC's analysis is thorough, and it provides sufficient justification for comparing the Starship to the Space Shuttle, as discussed below. Accordingly, the Court **SUSTAINS** the Government's objection and does not consider [redacted] testimony.

SMC compared SpaceX's Starship to the Space Shuttle development for multiple reasons. First, SMC determined that SpaceX's prototype was closer to the Space Shuttle in form, function, and complexity than other potential comparator launch vehicles. (AR Tab 132, 41619–20.)[12] As previously discussed, SMC believed that SpaceX's prototype was a revolutionary vehicle, which lends support to SMC's analogy. Second, SMC did not blindly adopt the analogy; on the contrary, it distinguished SpaceX's proposal and the Space Shuttle in several ways. For example, SMC acknowledged that SpaceX's model was "somewhat simplif[ied]" compared to the Shuttle and credited SpaceX's plan to avoid relying on major subcontractors. (*See* AR Tab 132, 41583, 41658.) SMC also gave credit to SpaceX's experience and heritage benefits. (*See* AR Tab 132, 41579.) Ultimately, the analogy to the Space Shuttle was but only one aspect of SMC's determination of SpaceX's schedule Criteria 3 risk. (*See* AR Tab 132, 41619 (referring to the Space Shuttle analogy as a "relevant benchmark").) The Court sees no reason to second-guess SMC's technical analysis and determinations.

In summary, the Court finds that SMC did not violate the APA in finding a significant likelihood that SpaceX's Category C solution would not meet the RFP need date.

C. RFP and Congressional Direction

SpaceX's next principal argument is that SMC contravened Congressional direction and the RFP criteria by denying SpaceX an LSA award. (Mot. 17.) To support this assertion, SpaceX proffers three arguments: (1) SMC adopted an unstated

[12] For example, SMC identified several "state of the art" components that could introduce schedule delays. (*See* AR Tab 132, 41620.)

preference for reliance on existing Government processes and facilities; (2) SMC favored competitors that proposed developmental solutions; and (3) SMC's portfolio decisions thwarted Congressional direction to end reliance on Russian rocket engines for NSS missions. (Mot. 18–20.) Therefore, SpaceX concludes that SMC's award decisions were unlawful. (Mot. 17.)

1. Threshold Arguments

Before diving into the Parties' substantive arguments, the Court considers two threshold issues: (1) SpaceX's argument that SMC's determinations are not entitled to deference because it violated federal law in making its award decisions; and (2) Orbital's contention that SpaceX does not have standing to pursue its statutory claims.

First, at the hearing, SpaceX sought to distinguish its RFP and Congressional direction arguments from the traditional arbitrary and capricious standard that courts employ in reviewing agency action. In response, Defendants argue that SpaceX's allegations that SMC violated the law are also subject to the APA's highly deferential standard of review. (Joint Resps. 2–3.)

In considering SpaceX's arguments, the Court will not defer to SMC's judgment if it finds that the Agency violated an unambiguous statute. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1979 (2016). On the other hand, the APA's deferential standard applies to disputes regarding the extent to which SMC endeavored to comply with Congress's broad pronouncements. *See* 5 U.S.C. § 706(2)(A) (defining the APA's standard as prohibiting agency action that is "arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with law*" (emphasis added)); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (applying APA's arbitrary and capricious standard to agency actions aimed at filling gaps in congressional directives). Although the Court considers SpaceX's statutory arguments,

most of SpaceX's arguments properly fall under the APA's standard.[13]

Second, Orbital argues that SpaceX "is not a suitable party-in-interest to assert its statutory claims" because its interests do not fall within the zone of interest that Congress intended to be protected or regulated. (*See* Orbital Opp'n 22, ECF No. 178 (quoting *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388 (1987)).) SpaceX counters that the Supreme Court has rejected that intended beneficiary standard for purposes of prudential standing. (*See* Reply 6 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012)).)

In *Patchak*, the Supreme Court noted that the prudential standing test does not require any "indication of congressional purpose to benefit the would-be plaintiff." 567 U.S. at 225 (internal quotation marks omitted). All that is required is that the plaintiff's interest is "arguably within the zone of interests to be protected or regulated by the statute." *Id.* at 224–25 (internal quotation marks omitted) ("We apply the test in keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.'"). The prudential standing test is not meant to be especially demanding, and courts must give the benefit of any doubt to the plaintiff. *Id.* at 225.

Here, the Court is satisfied that SpaceX meets the lenient prudential standing test. SpaceX's interest in a fair and legal competition that complies with Congress's intent to assure access to space without reliance on Russian rockets is arguably within the relevant zone of interests. Accordingly, the Court rejects Orbital's prudential standing argument.

2. Unstated Preference for Existing Government Processes and Facilities

SpaceX argues that SMC contravened the RFP criteria by adopting "an unstated preference for reliance on existing Government processes and facilities rather than

[13] For instance, SpaceX argues that SMC violated 10 U.S.C. § 2371b(b)(2) by failing to establish fair procedures for the LSA competition. (Joint Resps. 1.) However, SMC's efforts to comply with that mandate are best reviewed under the APA's standard given the statute's high level of generality.

investing in commercial systems adaptable to the Government's needs, as the RFP required." (Mot. 18 (citing AR Tab 46, 1342–43).) According to SpaceX, SMC failed to leverage commercial launch systems because none of the Intervenors proposed a commercially available or operational launch vehicle. (Mot. 18.) Instead, the Intervenors had little to no commercial launch experience, and their proposals were still in development. (Mot. 18.) In contrast, SpaceX claims that it is the only company that offered existing, certified, American-made launch vehicles that do not rely on Russian engines and have a meaningful commercial market. (Mot. 18.)

The Government maintains, however, that SMC followed the RFP requirements and leveraged commercial launch systems. (U.S. Opp'n 35.) The Court agrees. First, as already addressed above, SMC's preference for existing Government processes and facilities was not improper. SMC was not obligated to blindly accept SpaceX's risky proposal simply because it offered a "commercial" alternative to the Government's existing practices.

Second, the 2018 NDAA did not require proposed vehicles to be "operational." *See* NDAA of 2018, Pub. L. No. 115-91, § 1605(a)(1)(C), 131 Stat. 1283, 1724 (2017). In fact, the RFP acknowledged that funding *new* launch solutions was vital to accomplishing Congress's directive. (*See* AR Tab 38, 1260 ("[T]he key step to transition from the use of non-allied space launch engines, maintain assured access to space, and introduce sustainable competition for future EELV NSS launch services will be public private partnership agreements that partially fund industry's *new* and/or upgraded launch system solutions." (emphasis added)).)

Third, SpaceX's narrow definition of "commercially available" as referring to missions launched for private clients is unsupported. As the Government notes, "commercial" is a term of art that Title 51 of the U.S. Code (which governs national and commercial space programs) defines. Specifically, section 50101 defines "commercial provider" as "any person providing space transportation services or other space-related activities, primary control of which is held by persons other than Federal,

State, local, and foreign governments." 51 U.S.C. § 50101(1). Each of the Intervenors meets that definition.

For these reasons, the Court rejects SpaceX's argument that SMC violated the RFP's criteria.

3. Developmental Solutions Favoritism

SpaceX argues that SMC jeopardized American access to space and caused continued dependence on Russian rockets by favoring the Intervenors' developmental proposals, which may not be operational by SMC's need dates. (Mot. 19 (reiterating that each of the Intervenors proposed a Final Certification Margin of less than 14 months for the Category A/B missions).) SpaceX notes that none of the selected launch vehicles had been built, much less tested or certified. (Mot. 19.) In contrast, SpaceX's proposed vehicles were fully operational and capable of meeting SMC's deadlines. (Mot. 19.) According to SpaceX, including its vehicles in SMC's portfolio would have reduced the risk of delays and better ensured access to space. (Mot. 19.)

This argument is essentially duplicative of SpaceX's claims that SMC erred in evaluating the schedule risks of the Intervenors' proposals. Although SMC acknowledged that SpaceX's fully operational vehicles were a strength, (*see* AR Tab 132, 41579), SMC ultimately concluded that SpaceX's proposal as a whole was too risky and expensive. SpaceX's new arguments do nothing to change the Court's conclusion that SMC did not act arbitrarily in making its portfolio decisions for the Category A/B missions.[14] (*See* AR Tab 136, 41753 ("[T]his portfolio is most advantageous in achieving the goal of assured access to space via two or more domestic commercial launch service providers that also meet National Security Space

[14] The Government also disagrees with SpaceX's focus on the alleged superiority of its Category A/B solution. According to the Government, the RFP required SMC to evaluate whether the Offerors' met *all* requirements, not just the Category A/B ones. (U.S. Opp'n 38–39.) The Government reiterates that SpaceX's Category C solution was by far the most complicated and risky, which hurt SpaceX's entire proposal. (U.S. Opp'n 38.) The Court finds that SMC's conclusions are not irrational based on the record.

requirements on the required timeline. This selection represents the best value to the Government, both technically and financially, toward achieving this objective.")); *Marsh*, 490 U.S. at 377 (holding that courts must generally defer to the agency on actions involving a high level of technical expertise).

In addition, SpaceX argues that SMC failed to address the risk of choosing a portfolio that relies on common components, wherein the chosen vehicle solutions largely depend on each other for successful development. (Mot. 19–20 (claiming, for example, that ULA depends on both Blue Origin and Orbital for development of an engine and solid side booster).) Although SMC recognized this risk, SpaceX argues that it simply ignored it instead of amending the RFP to add evaluation criteria for the use of common components. (Mot. 20.)

SpaceX is wrong. SMC did consider the risk of relying on common components yet deemed it acceptable, given that the Government had used common propulsion systems in other launch systems. (*See* AR Tab 136, 41753.) Further, SMC explicitly chose not to include RFP evaluation criteria related to common engines "because it was not considered critical in assessing the design approaches or the likelihood of achieving the Government's objectives." (AR Tab 136, 41753.) SMC's technical decision is entitled to deference. *See Marsh*, 490 U.S. at 377; *Alaska Dep't of Env't Conservation*, 540 U.S. at 497 (holding that courts must uphold rational agency action even if the agency explained its decision with "less than ideal clarity"). In addition, it appears that SpaceX failed to administratively exhaust its argument that the RFP should have been amended. (*See* AR Tab 38, 1263 ("Any objection to the [RFP] . . . must be presented . . . within 10 calendar days of (1) the release of this solicitation or (2) the date the objector knows or should have known the basis for its objection.").) For these reasons, the Court rejects SpaceX's argument that SMC arbitrarily favored developmental solutions and failed to address the risks of relying on common components.

4. Congressional Direction to End Reliance on Russian Rocket Engines

SpaceX argues that SMC's portfolio decisions were arbitrary and capricious because they thwarted Congressional direction to end reliance on Russian rocket engines for NSS missions. (Mot. 20.) Specifically, SpaceX argues that SMC recognized the substantial risk that none of its chosen vehicles would be ready by the Category A/B missions' deadlines yet pardoned the Intervenors by noting that it could still rely on ULA's Russian-powered rockets or even SpaceX's Falcon 9 vehicle as alternatives. (Mot. 20.) In other words, instead of simply choosing SpaceX's proven product, SMC chose proposals that might ultimately force SMC to continue relying on Russian rockets. (Mot. 20–21.)

SpaceX's arguments fail for several reasons. First and foremost, section 1602 of the 2017 NDAA expressly allows SMC to award launch services programs that include the use of Russian rocket engines, with certain limitations, until December 31, 2022. *See* NDAA of 2017, Pub. L. No. 114-328, § 1602, 130 Stat. 1999, 2582 (2016). SMC acted rationally because the RFP schedule evaluation criteria for Category A/B considered the risk that the Intervenors would not fulfill the contract by April 1, 2022, nine months earlier than the NDAA deadline. SpaceX does not argue that SMC violated section 1602 of the 2017 NDAA; rather, SpaceX's argument is that SMC is violating Congress's broader goal to cease reliance on Russian rocket engines. In other words, SpaceX does not argue that nine months is an insufficient amount of buffer time, (*see* Reply 10), and even if it did, the Court would not second-guess SMC's acceptance of that risk. It is also not up to the Court to judge whether Congress's December 31, 2022 deadline conforms with its broader goal to expeditiously eliminate the use of non-allied rocket engines.

Second, SMC did not actually find a substantial risk that the Intervenors would fail to meet the RFP Category A/B timeline. In fact, ULA received a low risk rating for the Schedule subfactor. (AR Tab 132, 41460–61 (concluding that the risk in ULA's

Schedule subfactor had "little potential to cause disruption of schedule").) Although SMC gave Blue Origin and Orbital a moderate risk rating, it nonetheless determined that such risks could likely be overcome with special participant emphasis and close Government monitoring. (*See* AR Tab 132, 41514 (Blue Origin schedule evaluation), 41558 (Orbital schedule evaluation).) Notably, SMC also deemed SpaceX's schedule risk rating as moderate, and therefore liable to "potentially cause disruption of schedule, increased costs or degradation of performance." (AR Tab 132, 41621–22.)

Thus, the Court also rejects SpaceX's broad argument that SMC's portfolio decisions violated Congressional intent.

D. Cost Evaluation

SpaceX asserts that SMC's cost evaluations were anticompetitive and that it irrationally concluded that SpaceX required the greatest Government investment. (Mot. 21.) First, SpaceX argues that the record exposes ULA's proposal as incomplete, and thus, SMC's calculation of ULA's total Governmental investment is artificially low. (Mot. 21.) Second, SpaceX argues that SMC overstated SpaceX's total price by $125 million. (Mot. 23.)

1. The Nature and Cost of ULA's Proposal

SpaceX argues that ULA failed to count certain Government payments as Government investment, resulting in SMC failing to account for those payments in its cost evaluation for ULA. (Mot. 22.) Specifically, ULA's Government investment numbers did not include federal subsidies for launch infrastructure and personnel, certain launch service components (*e.g.*, [redacted]), or development of the BE-4 engine. (Mot. 21–23.) SpaceX argues that SMC should have considered those payments as Government investment because ULA's proposal leveraged those resources for its LSA solution. (Mot. 21–23.) According to SpaceX, SMC's failure to account for all of ULA's Government investments prejudiced SpaceX and rendered the decision to award ULA's contract irrational. (Mot. 23.)

As an initial matter, the Government and Intervenors argue that SpaceX should not be allowed to contest SMC's cost evaluations at all because SpaceX benefited from the same guidelines. (U.S. Opp'n 28; ULA Opp'n 36 n.19.) Specifically, the Government argues that SpaceX did not have to report billions of dollars in federal funds as Government investment even though it planned to leverage those projects to support its LSA bid. (*See* U.S. Opp'n 28.) The Court disagrees. SpaceX's proposal to leverage prior Government investment to perfect its methodology (for example, to "accurately estimate timeframes for BFR and minimize potential schedule risk") is not comparable to ULA's plan to leverage prior tangible Government investments such as facilities and workforce. (AR Tab 123, 39771, 39862.)

Further, SpaceX's arguments fail on the merits because the RFP's reporting requirements for the Government investment category excluded "costs incurred before" February 21, 2018 from the LSA proposals. (U.S. Opp'n 27 (quoting AR Tab 38, 1276–77).) The RFP also excluded "[p]arallel research or investment . . . [because] typically these activities will be undertaken regardless of whether the proposed project proceeds." (AR Tab 38, 1277.) Thus, the Government argues, ULA did not have to report prior Government investment that fell into one of these exceptions. For instance, with respect to whether the cost of certain launch service components should count as Government investment, ULA did differentiate between costs chargeable to the LSA program and those that would be undertaken regardless. (*See, e.g.*, AR Tab 120, 35377–58 [redacted].)

SpaceX also argues that SMC irrationally accepted ULA's breakdown of the development costs of the BE-4 engine made by Blue Origin. (Mot. 23.) However, SpaceX ignores that ULA has a [redacted] and that ULA [redacted]. (U.S. Opp'n 29–30; ULA Opp'n 37.) ULA included the costs [redacted]

[redacted]. (*See* AR Tab 120, 35371, 35373, 35892–93, 35981–83, 36063, 36261; AR Tab 132, 41644.) Accordingly, forcing ULA to include all BE-4 development costs would have resulted in duplicative costs for ULA and Blue Origin.

Moreover, [redacted]; thus, ULA properly excluded such costs from its proposal as allowed under the RFP. (U.S. Opp'n 29 (citing AR Tab 120, 35370, 35374).) Blue Origin also stated during its evaluation that the costs to develop the BE-4 engine were an "entirely industry cost share," rather than federally funded. (U.S. Opp'n 29–30 (citing AR Tab 98, 30705).) For these reasons, the Court concludes that SMC did not act arbitrarily or capriciously in evaluating the cost of ULA's proposal.

Nonetheless, SpaceX argues that SMC treated it unequally by adding to its proposed costs [redacted] in federal payments for the Falcon Heavy mission (the "STP-2"), even though those payments were made under a different federal contract from 2012. (Mot. 23 (citing AR Tab 131, 41390–91).) The Government admits that SMC included some of the costs associated with the STP-2 as LSA costs but counters that the RFP requirements mandated their inclusion. (U.S. Opp'n 30–31.)

The RFP required each Offeror to include a certification plan as part of its statement of work to demonstrate the efficacy of its launch system. (AR Tab 38, 1278.) Costs associated with the statement of work had to be included in the LSA proposal. (AR Tab 38, 1277.) The reason why SpaceX had to include costs associated with a prior Government award was that it was the only Offeror that included a certification flight (*i.e.*, STP-2) that was also subject to another Government contract. (AR Tab 132, 41622; AR Tab 152, 43104.) Even then, SMC excluded non-LSA Government costs associated with the STP-2 acquisition. (AR Tab 132, 41622; AR Tab 123, 39868 (SpaceX's Projected Investment Costs separating LSA and non-LSA Government investment).) Thus, the Court is persuaded that SMC acted rationally in including these costs.

As evidenced by the discussion above, SMC's cost evaluations were complex and involved several steps and requirements. SpaceX's oversimplification of the circumstances surrounding SMC's cost evaluation determinations undermines SpaceX's arguments. For these reasons, the Court concludes that SMC properly considered all costs required by the RFP.

2. The Total Price of SpaceX's Solution

SpaceX argues that SMC overstated its total cost to the Government by [redacted] (Mot. 23 (citing AR Tab 144, 42655).) According to SpaceX, SMC assumed the most expensive scenario with regard to SpaceX's solution by adding the cost of the east and west coast vertical integration options, even though SMC knew that only the east coast option would conceivably be exercised. (Mot. 23.) On the other hand, SpaceX argues SMC did *not* assume the most expensive scenarios for the other Offerors; for example, SMC assumed the best-case scenario when calculating ULA's total cost. (Mot. 23–24.) Thus, it claims that SMC wrongly deemed SpaceX the most expensive LSA solution. (Mot. 24.)

SpaceX's argument fails because the Government has established that it acted according to the RFP's requirements. The RFP required the Offerors to have vertical integration capabilities at both the east and west coasts. (AR Tab 38, 1282, 1288.) Yet SpaceX structured its vertical integration plans at both coasts as a set of options that could be exercised *bilaterally* at any time, but *unilaterally* by the Government only under certain circumstances. (*See* AR Tab 123, 39922; AR Tab 132, 41584.) For this reason, it was rational for SMC to include the cost of exercising both options to properly account for the entire cost of meeting the RFP requirement for vertical integration at both coasts.

SpaceX claims that "[o]nce SMC knew it had no mission requirement for West Coast vertical integration—a fact publicized in the Phase 2 RFP—it was irrational for SMC to increase SpaceX's evaluated costs to cover an option SMC would not exercise." (Reply 18.) But SMC could not have considered the Phase 2 requirements in its

evaluation because they were not published until May 3, 2019, months after SMC made its LSA decisions on October 9, 2018.[15] (*See* AR Tab 136, 41753.)

Further, SpaceX explains that ULA proposed [redacted]. (Mot. 23–24 (citing AR Tab 120, 35371, 35863–64).) However, SpaceX argues, SMC assumed the *best*-case scenario, *i.e.*, [redacted]. (Mot. 24.) SpaceX claims SMC failed to count the cost of "buying down" the risk posed by the Intervenors' Category A/B proposals. (Mot. 24.)

The Government contradicts SpaceX's version of SMC's evaluation. According to the Government, [redacted]. (U.S. Opp'n 34 (citing AR Tab 85, 16275–76).) In response, [redacted]. (AR Tab 120, 35863; AR Tab 132, 41462; AR Tab 140, 42320.) Stated otherwise, [redacted]. (*See* AR Tab 132, 41462 [redacted].) Although [redacted] (AR Tab 140, 42321), [redacted]

[15] SpaceX cites the [redacted] declaration to argue that SMC knew there was no need for west coast vertical integration. (*See* Mot. 23 (citing Ex. A, [redacted] Decl. ¶ 46).) As previously noted, the Government and Blue Origin object to SpaceX's declaration as extra-record evidence and lacking foundation for the quotes therein. (U.S. Opp'n 33; Blue Origin Evid. Objs. 24–25.) The Government also notes that SpaceX's quote regarding the Phase 2 RFP did not definitively state that a west coast vertical integration capability was not required. (U.S. Opp'n 33.) The Phase 2 RFP merely stated that such capability was not *currently* required, but that does not mean SMC would not include the requirement later. (U.S. Opp'n 33–34.) The Court concludes that SpaceX fails to establish that [redacted] statement is admissible under any of the *San Luis* exceptions for extra-record evidence. *See San Luis*, 776 F.3d at 992. Accordingly, the Government's and Blue Origin's objections to extra-record evidence are **SUSTAINED**. All other objections are **OVERRULED as moot.**

[redacted] (AR Tab 140, 42321). Thus, [redacted]. (U.S. Opp'n 34.) In any event, [redacted]. (*See* AR Tab 140, 42321 [redacted] (emphasis added)).)

SpaceX's arguments are not persuasive because SMC acted properly in accounting for the Government cost share in ULA's proposal. To the extent that [redacted] (*See* AR Tab 132, 41462 (noting that [redacted]).) SMC's agreement with ULA with respect to the [redacted] is hard to decipher. But what is clear is that [redacted].

Finally, the Court rejects SpaceX's argument concerning the costs of SMC's "buy down" option. The Court already concluded that the record supports SpaceX's claim that SMC had a backup plan in the event some of the chosen proposals failed. Nevertheless, SpaceX fails to establish that the RFP required SMC to account for these potential backup costs. The RFP only required the Offerors to include "*projected* total costs to complete the ELV Launch System prototype." (*See* AR Tab 38, 1271 (emphasis added).) In other words, under the RFP requirements, the Offerors only had to identify the costs necessary to develop *their proposals*.

In sum, the Court finds that SMC did not violate the APA in calculating the total cost of SpaceX's and ULA's proposals.

E. SpaceX's Motion to Supplement Court Record

Following the hearing on this matter, the Parties notified the Court that SMC made two contract awards under Phase 2 to SpaceX and ULA. (*See* Joint Notice 3, ECF No. 214.) On August 26, 2020, SpaceX filed a Motion to Supplement Court Record, asking the Court to consider SMC's redacted Phase 2 award decision. (*See* Mot. to Suppl. 1, ECF No. 215.) SpaceX clarifies that it "does not ask the Court to consider the Phase 2 award decision to find the Agency's [LSA] evaluation and award decision flawed." (Reply ISO Mot. to Suppl. 1, ECF No. 222.) Rather, SpaceX claims the decision is relevant to determining the relief to be granted if the Court concludes that SMC violated federal law and the APA. (*See* Reply ISO Mot. to Suppl. 1.) Each Defendant filed an opposition to SpaceX's Motion to Supplement. (*See* U.S. Opp'n to Suppl., ECF No. 220; ULA Opp'n to Suppl., ECF No. 216; Orbital Opp'n to Suppl., ECF No. 219; Blue Origin Opp'n to Suppl., ECF No. 218.)

For the reasons discussed, the Court concludes that SMC did not violate federal law or the APA in evaluating the Offerors' proposals and selecting its LSA portfolio.[16] Accordingly, SpaceX is not entitled to any relief in this action. For this reason, notwithstanding whether the Phase 2 decision is relevant to the question of remedies, SpaceX's Motion to Supplement is moot. Thus, the Court **DENIES** SpaceX's Motion to Supplement Court Record.[17]

V. CONCLUSION

For the reasons set forth above, the Court **DENIES** SpaceX's Motion for Judgment on the Certified Administrative Record. In their Joint Stipulation for Ordered

[16] Blue Origin asks the Court to also consider an alleged admission by SpaceX's CEO Elon Musk that SpaceX lost the LSA competition because it wrote a poor proposal that "missed the mark." (*See* Blue Origin Opp'n 18–19.) In support of its request to consider this extra-record evidence, Blue Origin relies on an unpublished District of Arizona decision from 2009. (*See id.* at 19 (quoting *Gemmel v. Systemhouse, Inc.*, No. 04-189, 2009 WL 3157262 (D. Ariz. Sept. 28, 2009).) The Court need not consider that alleged admission given that the administrative record is sufficient to deny SpaceX's Motion.

[17] Accordingly, the Court **VACATES** the October 5, 2020 hearing. (ECF No. 215.)

Briefing Schedule filed on November 20, 2019, the Parties agreed that this matter could be "adjudicated on briefing on the Certified Administrative Record." (Joint Stipulation for Briefing ¶ 13, ECF No. 161.) Accordingly, the Court **ORDERS** the Parties to **SHOW CAUSE**, in writing, no later than **October 2, 2020**, as to whether the Court should enter judgment in favor of Defendants given this decision, thereby closing the case. SpaceX's response is limited to two pages and Defendants may also file a combined two-page response.

IT IS SO ORDERED.

September 24, 2020

OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

435 F.Supp.3d 1003
United States District Court, D. Arizona.

MD HELICOPTERS INCORPORATED, Plaintiff,
v.
UNITED STATES of America, et al., Defendants.

No. CV-19-02236-PHX-JAT
|
Signed 01/24/2020

Synopsis

Background: Disappointed bidder brought action against the United States, alleging that the Army violated the Administrative Procedure Act (APA) by giving arbitrary and capricious reasons for not selecting bidder to participate in program to develop advanced military helicopters, and requesting injunctive relief in form of order directing Army to advance bidder's proposal to first phase of the program. Both sides moved for summary judgment.

Holdings: The District Court, James A. Teilborg, Senior District Judge, held that:

[1] limited waiver of sovereign immunity contained in APA did not apply, and

[2] Administrative Dispute Resolution Act's (ADRA) sunset provision deprived district court of jurisdiction.

Government's motion granted; bidder's motion denied.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (11)

[1] **Federal Courts** Jurisdiction, Powers, and Authority in General

Federal Courts Dismissal or other disposition

"Jurisdiction" is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

[2] **Federal Courts** Limited jurisdiction; jurisdiction as dependent on constitution or statutes

Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute.

[3] **Federal Courts** Necessity of Objection; Power and Duty of Court

Because a court lacking subject-matter jurisdiction also lacks the power to decide a case, courts have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.

[4] **United States** Necessity of waiver or consent

The United States, as sovereign, is immune from suit save as it consents; therefore, when a plaintiff sues the Federal Government, Congress's consent to suit is a necessary prerequisite for jurisdiction.

[5] **Federal Courts** Administrative agencies and proceedings in general

Although not itself a grant of jurisdiction, the Administrative Procedure Act (APA) waives sovereign immunity for certain claims brought under the aegis of federal question jurisdiction; this limited waiver of sovereign immunity applies to claims that are not for money damages, do not seek relief expressly or impliedly forbidden by another statute, and for which no adequate remedy is otherwise available. 5 U.S.C.A. § 702; 28 U.S.C.A. § 1331.

[6] **United States** Equitable remedies; specific performance

Tucker Act impliedly forbids declaratory and injunctive relief for contract claims against the

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government and precludes an Administrative Procedure Act (APA) based waiver of sovereign immunity in suits on government contracts; thus, if claim is contractually-based, there is no jurisdiction. 5 U.S.C.A. § 702; 28 U.S.C.A. § 1491.

[7] **United States** Actions in general

To determine whether a claim against the government is contractually-based for purposes of the Tucker Act, courts look to the source of rights upon which the plaintiff bases its claims, and the type of relief sought or appropriate. 28 U.S.C.A. § 1491.

[8] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Limited waiver of sovereign immunity contained in the Administrative Procedure Act (APA) did not apply to disappointed bidder's claim for injunctive relief, an order directing the Army to advance its proposal to first phase of advanced military helicopter prototype program operated under Army's authority to enter "other transactions" (OT), and thus, Tucker Act impliedly barred district court's jurisdiction, since OT agreement that bidder sought was a contract, and right to have Army evaluate its prototype project, and to receive associated funding, stemmed from that potential contract. 5 U.S.C.A. § 702; 28 U.S.C.A. § 1491.

[9] **Public Contracts** Bidding and Bid Protests

United States Bidding and Bid Protests

As used in the Administrative Dispute Resolution Act (ADRA), "procurement" refers to all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout. 28 U.S.C.A. § 1491(b)(1).

[10] **Federal Courts** Public contracts

Court of Federal Claims has exclusive jurisdiction over a case when the government has at least initiated a procurement or initiated the process for determining a need for acquisition. 28 U.S.C.A. § 149(b)(1).

[11] **Federal Courts** Public contracts

Administrative Dispute Resolution Act's (ADRA) sunset provision deprived district court of jurisdiction over disappointed bidder's protest of Army's selection of entitles for award of "other transactions" (OT) agreement to participate in program to develop advanced military helicopter prototype, since actions that bidder objected to took place within procurement process, determining the need for acquisition of advanced helicopters. 28 U.S.C.A. § 149(b)(1).

Attorneys and Law Firms

***1005** Brett William Johnson, Colin Patrick Ahler, Derek Conor Flint, Eric Harmon Spencer, Snell & Wilmer LLP, Phoenix, AZ, for Plaintiff.

Anne Elizabeth Nelson, US Attorneys Office, Phoenix, AZ, James Mackey Ives, US Dept. of the Army US Legal Services Agency, Fort Belvoir, VA, for Defendants.

ORDER UNDER SEAL

James A. Teilborg, Senior United States District Judge

Plaintiff MD Helicopters, Inc. ("MDHI") alleges that Defendants the United States of America, the United States Department of the Army, and the Secretaries of Defense and the Army in their official capacities (collectively, "the Army"), violated the Administrative Procedure Act ("APA") by giving arbitrary and capricious reasons for not selecting MDHI to participate in the Future Attack Reconnaissance Aircraft Competitive Prototype ("FARA CP") program. (Doc. 135 at 1–2). It seeks to compel "the Army to advance MDHI's proposal" to Phase 1 of the FARA CP program. (Doc. 1 at 5).

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The parties have filed cross-motions for summary judgment on this claim.

I. BACKGROUND

A. Statutory Background: Other Transaction Authority

At the dawn of the space race, the Soviet Union successfully launched the Sputnik satellite into Earth's orbit, prompting a growing national concern that the United States had fallen behind its rivals technologically. Heidi M. Peters, Cong. Research Serv., R45521, *Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress* 1 (2019), https://crsreports.congress.gov/product/pdf/R/R45521. In response, Congress passed the National Aeronautics and Space Act of 1958, which established the National Aeronautics and Space Administration ("NASA"). *Id.* To enable NASA to pursue its mission without encountering unnecessary delay, Congress empowered it with authority to "enter into and perform contracts, leases, cooperative agreements, or *other transactions* as may be necessary in the conduct of its work and on such terms as it may deem appropriate." National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, § 203(5), 72 Stat. 426, 430 (1958) (emphasis added). Congress has since extended the authority to enter into "other transactions" ("OTs") to several other executive agencies, including the Department of Defense ("DoD"). Peters, *supra*, at 1. As the Army puts it, OTs have several benefits in this context, including:

> (a) attracting non-traditional defense contractors to propose prototype projects; (b) encouraging traditional defense contractors to use new and innovative techniques and processes to accelerate development of technologies that are relevant to both defense and commercial markets; and (c) using flexible business ***1006** arrangements to accelerate development and transition to production.

(Doc. 70 at 6).

Two statutes currently govern DoD's authority to enter into OTs. The first authorizes the "Secretary of Defense and the Secretary of each military department" to "enter into transactions (other than contracts, cooperative agreements, and grants) ... in carrying out basic, applied, and advanced research projects." 10 U.S.C. § 2371(a). The second authorizes OTs for "carry[ing] out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by [DoD], or to improvement of platforms, systems, components, or materials in use by the armed forces." 10 U.S.C. § 2371b(a)(1). This second statute also authorizes the government to enter into an OT for follow-on production, which may be awarded without using competitive procedures if certain conditions are met. 10 U.S.C. § 2371b(f).

B. Factual Background: The FARA CP Program and MDHI's Proposal

In October of 2018, the U.S. Army Contracting Command–Redstone issued Solicitation No. W911W6-19-R-0001 ("the Solicitation") for proposals for the FARA CP. (Docs. 1 at 2; 71 at 3; 136 at 2). Because the Army identified the need to act quickly with respect to updating its helicopter fleet, (*see* Doc. 42 at 3), it structured the FARA CP program "as a phased approach with aggressive deadlines," (Doc. 136 at 2). In particular, the Army elected to use OTs for prototype projects under 10 U.S.C. § 2371b to award funding to the selected participants. (Doc. 36-3 at 3–5, 9; *see also* Doc. 80 at 1, 5).

As the Solicitation outlined, the FARA CP program will progressively down-select among candidates until potentially only one entity remains. That process would begin with prospective bidders submitting proposals to the Army. (Doc. 36-3 at 3). From these, the Army would select several entities for the award of OT agreements. (*Id.* at 4–5). The Army would then advance the recipients of the OT agreements ("Performers") to Phase 1, giving them "nine months to develop preliminary designs and provide the [Army] team with the data and insight required for the [Army] to down-select to two (or possibly more based on funding available) Performers for Phase 2." (*Id.* at 4–5). The Solicitation estimated that, under the OT agreements, "[e]ach Phase 1 Performer [would] receive approximately $15 [million] between" fiscal years ("FYs") 2019-20. (*Id.* at 9). In later phases, Performers would design, build, and test their proposed aircraft before providing them to the Army for further evaluation. (*Id.* at 5–6). "If executed," the final

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phase of the FARA CP program contemplates the potential award of a follow-on production OT to a Performer for entry into subsequent full system integration, qualification, and production efforts. (*Id.* at 6).

In response to the Solicitation, MDHI submitted a proposal ("the Proposal") to participate in the FARA CP program. (Doc. 1 ¶ 7). After evaluating the Proposal, the Army notified MDHI that it was not selecting MDHI to participate in the FARA CP program because "MDHI's proposed design purportedly did not meet the Solicitation's requirements." (*Id.* ¶ 8). Shortly thereafter, MDHI filed a "bid protest objecting to the Army's ... action with the Government Accountability Office ("GAO")." (*Id.* ¶ 9). The GAO dismissed the protest, reasoning that while it had jurisdiction to review "a timely pre-award protest that an agency is improperly using its [OT] authority to procure goods or services," the GAO was not statutorily authorized to review OTs because they are ***1007** not "procurement contracts." (Doc. 13-1 at 3); *see also* 4 C.F.R. § 21.5(m) ("GAO generally does not review protests of awards, or solicitations for awards, of agreements other than procurement contracts...."). MDHI then filed a complaint in this Court, alleging that the Army "failed to properly evaluate the Proposal" and "arbitrarily and capriciously ignored or misunderstood important aspects of the Proposal." (Doc. 1 ¶ 15).

II. JURISDICTION

Before reaching the merits, this Court must first address the question whether it has subject-matter jurisdiction over this action. *See Belleville Catering Co. v. Champaign Mkt. Place, L.L.C.*, 350 F.3d 691, 693 (7th Cir. 2003) (explaining that, notwithstanding the fact that no party contested jurisdiction, "inquiring whether the court has jurisdiction is a federal judge's first duty in every case"). The parties agree that this Court possesses subject-matter jurisdiction to review the Army's decision under 28 U.S.C. § 1331 and 5 U.S.C. § 702. (Docs. 66 & 70). Intervenors to this action have, however, argued that this Court lacks jurisdiction for two independent reasons. Citing *Cooper v. Haase*, 750 F. App'x 600, 601 (9th Cir. 2019) and *Gabriel v. General Services Administration*, 547 F. App'x 829, 831 (9th Cir. 2013), intervenors assert that "district courts lack jurisdiction over APA claims challenging the award of ... contracts." (Doc. 43 at 8). Separately, citing this Court's ruling in *Fire-Trol Holdings L.L.C. v. United States Department of Agriculture Forest Service*, No. CV-03-2039-PHX-JAT, 2004 WL 5066232, at *3–4 (D. Ariz. Aug. 13, 2004), intervenors argue that the sunset provision of the Administrative Dispute Resolution Act of 1996 ("ADRA") eliminated district courts' jurisdiction to hear the kind of "bid protest" cases that they formerly could under their "*Scanwell* jurisdiction." (Doc. 43 at 8).

In response, MDHI claims that, unlike *Cooper* and *Gabriel*, this Court may properly exercise jurisdiction because MDHI has not asserted a contract with the government. (Doc. 66 at 3). The parties argue further that Plaintiff's claim is not procurement-related because OTs are "not procurement contracts" and the ADRA's sunset provision terminated district court jurisdiction only over procurement matters. (Docs. 66 at 2–3; 70 at 10–12).

a. Legal Standard

[1] **[2]** **[3]** **[4]** "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868). " 'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.' " *Gunn v. Minton*, 568 U.S. 251, 256, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994)). Because a court lacking subject-matter jurisdiction also lacks the power to decide a case, courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). "The United States, as sovereign, is immune from suit save as it consents...." *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); *see also Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998) ("[A] suit against the United States must start from the ... assumption that no relief is available."). Therefore, when a plaintiff sues the Federal Government, Congress's consent to suit is a necessary "prerequisite for jurisdiction." ***1008** *United States v. Mitchell*, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983); *see also Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed *in statutory text* ...." (citations omitted)) (emphasis added); *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1090 (9th Cir. 2007) (explaining that, typically, "[o]nly Congress enjoys the power to waive the United States' sovereign immunity") (citing *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 734, 102 S.Ct. 2118, 72 L.Ed.2d 520 (1982)); *Brazil v. Office of Pers. Mgmt.*, 35 F. Supp. 3d. 1101, 1116 (N.D. Cal. 2014) ("[A]n agency

cannot waive sovereign immunity and thus alter federal court jurisdiction.") (citing *Carlyle Towers Condo. Ass'n v. FDIC*, 170 F.3d 301, 310 (2d Cir. 1999)).

[5] Although not itself a grant of jurisdiction, the APA waives sovereign immunity for certain claims brought under the aegis of 28 U.S.C. § 1331. *Tucson Airport Auth.*, 136 F.3d at 645. This limited waiver of sovereign immunity applies to claims that are not for money damages, do not seek relief expressly or impliedly forbidden by another statute, and for which no adequate remedy is otherwise available. *Id.*

b. MDHI's Requested Relief is Impliedly Forbidden by the Tucker Act

[6] **[7]** "[T]he Tucker Act 'impliedly forbids' declaratory and injunctive relief and precludes [an APA-based] waiver of sovereign immunity in suits on government contracts." *N. Side Lumber Co. v. Block*, 753 F.2d 1482, 1485 (9th Cir. 1985); *see also Price v. U.S. Gen. Servs. Admin.*, 894 F.2d 323, 324 (9th Cir. 1990). Thus, if the claim is "contractually-based, there is no jurisdiction." *Tucson Airport Auth.*, 136 F.3d at 646. This is true even if the action is brought under the APA. *Price*, 894 F.2d at 324. To determine whether a claim is contractually-based, courts look to "the source of rights upon which the plaintiff bases its claims, and ... the type of relief sought (or appropriate)." *Gabriel*, 547 F. App'x at 831 (quoting *Doe v. Tenet*, 329 F.3d 1135, 1141 (9th Cir. 2003)).

MDHI attempts to distinguish the case at bar from *Gabriel*, but the facts are virtually identical. There, the plaintiff submitted an unsuccessful bid to purchase several lighthouses and subsequently sued for equitable relief against the General Services Administration ("GSA"). 547 F. App'x at 831. The Ninth Circuit explained that the plaintiff's "source of rights stem[med] from a potential contract with the GSA" because an injunction would have required the GSA to accept his bid and sell him the lighthouses. *Id.* Thus, the relief requested was "just another name for specific performance" and "the natural inference follow[ed] that a contractual remedy indicate[d] a contractually-based set of claims." *Id.*

MDHI seeks an order directing the Army to advance it to Phase 1 of the FARA CP program. (Doc. 1 at 5). As noted, under the Solicitation, the right of an entity to even participate in Phase 1—and thus to receive the accompanying funding award and prototype evaluation—turns on whether the Army awarded that entity an OT agreement. Therefore, if the OT agreement is a contract, then the conclusion seems inescapable that MDHI seeks to force the Army to award it a contract and to obtain rights flowing from an accepted bid—the kind of relief that the Tucker Act impliedly forbids before the district court.

MDHI argues that its "claim is *not* based on the Tucker Act or any express or implied contract" meaning "*Cooper* and *Gabriel* are irrelevant." (Doc. 66 at 3). To the extent that MDHI argues that the ***1009** relief requested is not impliedly forbidden by the Tucker Act simply because MDHI invokes the APA, its argument is misplaced. *Price*, 894 F.2d at 324; *see also Doe*, 329 F.3d at 1141 ("The label that is attached to a claim is not conclusive, however."); *Henderson v. U.S. Air Force, DMAFB*, No. CIV 06-323-TUC-FRZ, 2007 WL 2081481, at *2 (D. Ariz. July 20, 2007) ("The substance of the Complaint and not Plaintiff's characterization, defines this Court's jurisdictional review...."). To the extent that MDHI argues that OTs are not contracts, however, its argument carries some persuasive force given that OTs are statutorily defined as transactions that are "other than contracts." 10 U.S.C. § 2371(a).

Nonetheless, this position is undermined by the fact that DoD guidance and the Congressional Research Service—in documents the Army itself relied on—take the position that the word "contracts" in 10 U.S.C. § 2371(a) means "procurement contracts." *See Other Transactions Guide* at 38; Peters, *supra*, at 2 ("Other transactions are legally binding contracts...."). [1] Indeed, DoD's guidance states: "OT agreements are not procurement contracts, but they are legally valid contracts. They have all six legal elements for a contract ... and will be signed by someone who has the authority to bind the [F]ederal [G]overnment.... The terms and conditions can be enforced by and against either party." *Other Transactions Guide* at 38. In reality, these sources explain, 10 U.S.C. § 2371(a) refers to OTs as "other than contracts" to indicate that they are not subject to regulations, such as the Federal Acquisition Regulation, that usually govern the acquisition process. *Other Transactions Guide* at 38; Peters, *supra*, at 4. Even the Army's supplemental brief addressing jurisdiction implicitly recognizes that OTs are contracts, citing *Protect Lake Pleasant LLC v. McDonald*, 609 F. Supp. 2d 895 (D. Ariz. 2009) for the proposition that district courts retain jurisdiction under the ADRA's sunset provision in non-procurement contract cases. (Doc. 70 at 8). [2]

1 The *Other Transactions Guide* is part of this Court's record, attached to the declaration of General Walter T. Rugen. (Doc. 42-1).

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2 Importantly, *Protect Lake Pleasant LLC*'s analysis of the plaintiffs' claim that Maricopa County violated the Federal Property and Administrative Services Act of 1949 is distinguishable from MDHI's case because the plaintiffs sought only to prevent the construction of a marina and yacht club, not an order requiring the government to accept its bid. 609 F. Supp. 2d. at 904–15.

Despite the broad language used in these sources, this Court need not determine whether all OTs are contracts. Instead, this Court must look to the OT agreement at issue in this case. It is in examining the terms of the OT agreement—appended to the Solicitation—that it becomes clear that MDHI seeks the award of a contract and to obtain the benefits flowing from that contract.

The OT agreement governs virtually every aspect of the business relationship between the parties but, at its most basic level, it awards funds to the Phase 1 Performer. (Doc. 36-3 at 49). In exchange for those funds, the Phase 1 Performer "shall be responsible for performance of the work set forth in this Agreement at Attachment 1." (*Id.* at 51). Attachment 1 lists the Army's objectives for the FARA CP program and requires the Performer to:

- Define, design, build and test prototype aircraft that meet mandatory attributes and other performance requirements as described in System Performance Specification and Initial Capability Refinement Document....
- Collaboration with the [Army] on developing cost models, physics-based ***1010** engineering models and systems engineering models.
- Ground testing, flight envelope expansion and vehicle characterization testing necessary to develop data required to demonstrate the FARA CP capabilities and requirements.
- Data to support airworthiness and acquisition planning (e.g. manufacturing readiness level, supportability, suitability) for anticipated subsequent full system qualification and production activities.

(*Id.* at 83). Moreover, as indicated by the Solicitation, the award is a "[f]ixed amount OT," defined in the OT agreement as an arrangement in "which the awardee agrees to complete a prototype project for an agreed upon total price and where payments are not based on amounts generated from the awardee's financial or cost records." (*Id.* at 53). The OT agreement goes on to state that, in the event "estimated total program costs are projected to exceed the total amount of this Agreement," the Performer need not continue performance "unless[ ] and until the [Army] notifies the Performer in writing that the amount allotted by the [Army] has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the [Army] to this Agreement." (*Id.* at 64). The OT agreement even establishes dispute resolution procedures in the event of a disagreement between the Army and the Performer. (*See id.* at 65–66).

[8] There are myriad other aspects of the business relationship controlled by the OT agreement, including patent rights to inventions conceived during the FARA CP program, (*id.* at 66–70), the amount of access foreign firms or institutions may have to any of the findings and technology developed, (*id.* 73–75), disclosure of information, (*id.* at 79–80), and disposition of property acquired during the FARA CP program, (*id.* at 76–79). The OT agreement additionally indicates that, a Performer signing or accepting funds under it, also agrees to comply with a panoply of federal laws and regulations. (*Id.* at 79). But the Court need not rehearse all aspects of the lengthy OT agreement; rather, given that all the features of a contract are present, the Court has little difficulty concluding that the OT agreement that MDHI seeks is a contract. The right to even have the Army evaluate a prototype project, and to receive the associated funding, stems from that potential contract. Because, just like the plaintiff in *Gabriel*, MDHI's source of rights stems from a potential contract with the government, the APA does not waive sovereign immunity with respect to its claim for injunctive relief in this Court.

c. The ADRA Precludes Jurisdiction

Having concluded that the limited waiver of sovereign immunity contained in the APA does not apply, this Court could normally stop its analysis and dismiss this action for lack of subject-matter jurisdiction on that basis. In seeming contradiction to the relief requested in its complaint, however, MDHI's motion for summary judgment asks this Court to issue an order to "re-open the evaluation process to provide MDHI with a proper Phase 1 evaluation." (Doc. 135 at 16). Given that this new request is somewhat ambiguous as to whether it seeks advancement to Phase 1, or a reevaluation of the Proposal, this Court will also address whether the ADRA's sunset provision deprives it of jurisdiction here. Although there is a relative lack of authority addressing the interplay between statutes authorizing OTs and the ADRA, this Court concludes that this action falls within the terms of the ADRA's

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sunset provision, meaning that this Court cannot exercise jurisdiction.

The ADRA states in pertinent part that

> ***1011** both the Unite[d] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.

28 U.S.C. § 1491(b). Federal district court jurisdiction over the actions described in this section sunset on January 1, 2001. As this and several other courts have found, if an action falls within the terms of 28 U.S.C. § 1491(b)(1), the Court of Federal Claims has exclusive jurisdiction even when the plaintiff invokes the APA. *See, e.g.*, *Vero Tech. Support, Inc. v. U.S. Dep't of Def.*, 437 F. App'x 766, 768 (11th Cir. 2011) (reasoning that "the Tucker Act ... forbid[s] relief that would otherwise be available under the APA, mainly the ability to resolve an APA claim that falls within the scope of the Tucker Act ... in a federal district court"); *Sigmatech, Inc. v. U.S. Dep't of Def.*, 365 F. Supp. 3d 1202, 1205–06 (N.D. Ala. 2019); *Validata Chem. Servs. v. U.S. Dep't of Energy*, 169 F. Supp. 3d 69, 75 (D.D.C. 2016); *Fire-Trol Holdings LLC*, 2004 WL 5066232, at *4; *see also Space Exp. Techs. v. United States*, 144 Fed. Cl. 433, 439 (2019) (analyzing jurisdiction under the ADRA).

It is indisputable that MDHI is objecting to "a solicitation by a Federal agency for bids or proposals for a proposed contract," given that its allegations relate entirely to the Army's rejection of the Proposal. Although such an allegation might appear to place this case squarely within the text of the ADRA, the Federal Circuit has explained that the ADRA "speaks 'exclusively' to 'procurement solicitations and contracts.' " *Hymas v. United States*, 810 F.3d 1312, 1317 (Fed. Cir. 2016) (quoting *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1245 (Fed. Cir. 2010)) (emphasis omitted).[3] Indeed, in its review of the ADRA's legislative history, the Federal Circuit observed that the statute's sponsors clearly "sought to channel the entirety of judicial government contract procurement protest jurisdiction to the Court of Federal Claims." *Emery Worldwide Airlines v. United States*, 264 F.3d 1071, 1079 (Fed. Cir. 2001). Thus, while it is true that "a narrow application of [the ADRA] does not comport with the statute's broad grant of jurisdiction over objections to the procurement process," *Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1381 (Fed. Cir. 2012), the Federal Circuit has reasoned that the types of governmental actions reviewable under the ADRA are limited to procurement decisions, *Cleveland Assets, LLC v. United States*, 883 F.3d 1378, 1381 (Fed. Cir. 2018) (citing *Distributed Sols, Inc. v. United States.*, 539 F.3d 1340, 1346 (Fed. Cir. 2008)); *Res. Conservation Grp., LLC*, 597 F.3d at 1245 ("[R]elief under [28 U.S.C. §] 1491(b)(1) is unavailable outside the procurement context.").

3 This Court is "especially interested in the Federal Circuit's views on" the ADRA because that court has "exclusive appellate jurisdiction over all cases filed on or after January 1, 2001." *See Baltimore Gas & Elec. Co. v. United States*, 290 F.3d 734, 737 (4th Cir. 2002).

[9] **[10]** As used in the ADRA, "procurement" refers to "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." *Distributed Sols., Inc.*, 539 F.3d at 1345 (emphasis and quotation omitted); *see also* 41 U.S.C. § 111. Therefore, the Court of Federal Claims has exclusive jurisdiction ***1012** over a case when "the government [has] at least initiated a procurement[ ] or initiated 'the process for determining a need' for acquisition.' " *AgustaWestland N. Am., Inc. v. United States*, 880 F.3d 1326, 1330 (Fed. Cir. 2018) (quoting *Distributed Sols., Inc.*, 539 F.3d at 1346).

In considering whether an objection to an OT is made "in connection with a procurement," this Court fortunately does not write on a blank slate. The Court of Federal Claims faced just such an issue in *Space Exploration Technologies Corp. v. United States*. There, SpaceX challenged the government's "evaluation and portfolio award decisions for a request for proposals to provide space launch services for national security missions." 144 Fed. Cl. at 435. SpaceX made its objection in the overarching context of the "National Security Space Launch program," which "is charged with procuring launch services to meet the government's national security space launch needs." *Id.* at 436. To accomplish this goal, the

government initiated a multi-phase strategy in FY 2013 that will be completed by FY 2027. *Id.* at 436–37. The program's first phase involved "a competition for the development of space launch vehicles," during which the government sought to develop a prototype that could comply with national security requirements while also providing domestic commercial launch services. *Id.* at 437. The awardees of the competition would receive government funding for further prototype development and testing. *Id.* There, as here, the solicitation and resulting awards were issued under DoD's authority to enter into other transactions. *Id.* at 438.

In a separate and distinct part of the government's strategy, it anticipated "awarding two requirements contracts for launch services, delivering multiple national security space missions with annual ordering periods from FY 2020 through FY 2024." *Id.* at 437. This "Phase 2 Procurement" would be held open to "all interested offerors," meaning that even those that had not received funding awards during the competition could seek to submit a bid for the procurement. *Id.* at 438.

Addressing SpaceX's contention that jurisdiction was proper under the ADRA, the Court of Federal Claims first looked to the awards issued as a result of the competition. *Id.* at 442. Although those awards did not themselves support ADRA-based jurisdiction, the court nonetheless examined whether the awards were sufficiently "in connection with" the Phase 2 Procurement to support exercising jurisdiction over the action. *Id.* at 443. The court reasoned that they were not because: (1) the competition and the Phase 2 Procurement "involve[d] separate and distinct solicitations;" (2) the competition and the Phase 2 Procurement "involve[d] different acquisition strategies," including the legal requirements that governed each solicitation; (3) the competition "did not involve the procurement of any goods or services ... the [government] will not purchase or own these prototypes;" and (4) despite the fact that competition winners would receive federal funding, placing them in an advantageous position for the Phase 2 Procurement, the competition awards would not be outcome-determinative for the Phase 2 Procurement which remained a "fully open competition" and would not be limited to competition award recipients. *Id.* at 443–45. Acknowledging that the question before it was "a close one," the court found that the competition awards were simply too attenuated to the Phase 2 Procurement to confer jurisdiction. *Id.* at 445; *see also Protect Lake Pleasant LLC*, 609 F. Supp. 2d at 898–915 (explaining that a challenge to a solicitation for a concession agreement was not made in connection with a procurement even though the solicitation was authorized by an agreement that amounted to at least a partial procurement).

***1013** The facts surrounding the Army's decision to reject the Proposal at issue here demonstrate that the present objection relates far more directly to an eventual procurement than the solicitation at issue in *Space Exploration Technologies*. The very reason the Army embarked upon the FARA CP program was an identified lack of aircraft with "the ability to conduct armed reconnaissance, light attack, and security with improved stand-off and lethal and non-lethal capabilities with a platform sized to hide in radar clutter and for the urban canyons of mega cities." (Doc. 36-3 at 3). Thus, the entire purpose of the Army's "prototyping and testing effort" is to "support a decision to enter into a formal program of record for full system integration, qualification and production as a rapid acquisition." (*Id.*). Importantly, and quite unlike the solicitation at issue in *Space Exploration Technologies*, at each progressive stage of the FARA CP program the Army will down-select among the Performers who participated at the previous stage. (Doc. 36-3 at 4–6). Thus, a decision excluding a Performer (or, in MDHI's case, a would-be Performer) from any phase of the FARA CP program would be outcome-determinative because only entities that are "selected for the preceding phase of the FARA CP program shall be eligible for any subsequent phases," and thus any eventual procurement. (Doc. 36-3 at 4) Further unlike *Space Exploration Technologies*, the FARA CP program does not involve two distinct solicitations. Indeed, the Solicitation anticipates possibly awarding a "follow-on production contract or transaction *without the use of competitive procedures*" under 10 U.S.C. § 2371b(f) to Performers who successfully complete the prototype project. (Doc. 36-3 at 6) (emphasis added).

As its final argument in favor of jurisdiction, the Army asserts that "[i]t is legally presumed that Congress would not have used the term 'other transactions' if it had meant 'procurements' within the meaning of the Tucker Act, FGCAA, and CICA." (Doc. 70 at 12). It is generally true that "Congress is presumed to enact legislation with knowledge of the law and a newly-enacted statute is presumed to be harmonious with existing law and judicial concepts." *Aectra Ref. & Mktg. v. United States*, 565 F.3d 1364, 1370 (Fed. Cir. 2009). But what should be clear by now, and what this and the parties' other arguments have glossed over, is that the ADRA's applicability does not depend on the present existence of an actual procurement contract so long as the challenged action bears a sufficient connection to a procurement. Because the

Court's resolution of this issue does not depend on any characterization of the OT agreement as a "procurement," there is no disharmony between the ADRA and the other laws that the Army identifies.

[11] To be sure, the Solicitation employs contingent language regarding Phase 4 of the FARA CP program, the point at which any procurement will occur. It is nonetheless clear that the Army's decision to issue the Solicitation, to reject the Proposal, and to award OTs to other Performers, all took place within the procurement process. As indicated, the main purpose of the FARA CP program is to develop data to support a decision to integrate the next generation of light attack helicopter into the armed forces. Thus, the actions that MDHI objects to took place within the "process of determining a need for acquisition" of advanced helicopters such that the objection falls within the plain language of the ADRA.

Accordingly, the Court concludes that it lacks jurisdiction under the ADRA's sunset provision.

*1014 III. CONCLUSION

Based on the foregoing,

IT IS ORDERED that this case is dismissed, without prejudice, for lack of jurisdiction in this Court. The Clerk of the Court shall enter judgment 15 days after the date of this Order unless, prior thereto, a party moves for reconsideration (*see* L.R. Civ. 7.2(g)) or to transfer this case to another court. [4]

4 This Order creates no presumption that transfer is appropriate. Thus, any motion to transfer must cite and apply the controlling legal authority on transfer.

IT IS FURTHER ORDERED that the motions for summary judgment (filed at Docs. 135, 136 and lodged at Docs. 132 and 134) are denied without prejudice for lack of jurisdiction.

IT IS FURTHER ORDERED that because, for purposes of this Order, the Court did not consider any sealed materials, the Motions to Seal are denied as moot (Docs. 131, 133, 137, 139, 144, and 145); however, all the related documents (Docs. 132, 134, 138, 140, 143, and 146) shall remain lodged and sealed.

IT IS FINALLY ORDERED that the Clerk of the Court shall file this Order under seal. The parties must, within 14 days of the date of this Order, file a motion to seal this Order which must attach a proposed redacted version of this Order to be filed in the public record. Any motion to seal must identify why the information sought to be redacted satisfies the "compelling reasons" standard articulated in *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). The Court retains discretion to accept or reject each redaction proposed by the parties. If no motion to seal is filed within 14 days, the Clerk of the Court shall unseal this Order. [5] The motion at Doc. 149 is GRANTED to the limited extent specified herein.

5 Because the Court did not rely on any sealed information in this Order, the Court does not anticipate a motion to seal. The Court has included this provision out of an abundance of caution.

All Citations

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United States Court of Federal Claims.

KINEMETRICS, INC., Plaintiff,
v.
UNITED STATES, Defendant,
and
Nanometrics, Inc., Defendant-Intervenor.

No. 21-1626
|
(Filed Under Seal: September 10, 2021)
|
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Attorneys and Law Firms

Howard W. Roth, Oles Morrison Rinker & Baker LLP, Seattle, Washington for plaintiff, Kinemetrics, Inc. With him on briefs were Meghan A. Douris and Ryan M. Gilchrist, Oles Morrison Rinker & Baker LLP, Seattle, Washington.

Evan Wisser, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C. for the United States. With him on briefs were Brian M. Boynton, Acting Assistant Attorney General, Civil Division, Martin F. Hockey, Jr., Acting Director, and Douglas K. Mickle, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice. Of counsel were Michael J. Farr, Senior Trial Attorney, Commercial Litigation Field Support Center, and David Charitat, Legal Advisor, Air Force Technical Applications Center, Air Force Judge Advocate General's Corps.

Joseph G. Martinez, Dentons US LLP, Denver, Colorado for Defendant-Intervenor, Nanometrics, Inc. With him on brief was K. Tyler Thomas, Dentons US LLP, Denver, Colorado.

Post-award bid protest; the Department of Defense's pilot program for acquisitions of "innovative commercial items, technologies, and services;" National Defense Authorization Act for Fiscal Year 2017, § 879, 130 Stat. 2312; jurisdiction; standing; evaluation by peer review; exercise of discretion

OPINION & ORDER [1]

[1] Because of the protective order entered in this case, this opinion was initially filed under seal. The court requested that the parties review the decision and provide proposed redactions of any confidential or proprietary information. No redactions were requested.

LETTOW, Senior Judge.

***1** The United States Department of the Air Force ("the Air Force" or "the agency") used a relatively novel procurement method to acquire seismic equipment for use in monitoring nuclear treaty compliance. Kinemetrics, Inc. ("Kinemetrics") protests the award and seeks a preliminary injunction. *See* Pl.'s Mot., ECF No. 2; Mem. in Support of Pl.'s Mot. ("Pl.'s Mem."), ECF No. 3. The United States has filed an opposition and a cross-motion to dismiss, *see* Def.'s Cross-Mot., ECF No. 26. The procurement at issue was instituted as a Commercial Solutions Opening ("CSO") Acquisition, which included an iterative initial proposal and a peer review process, with the result that a proposal by Nanometrics Inc. ("Nanometrics") was selected by the Air Force to receive an agreement. *See* Def.'s Cross-Mot. at 5, 9. Nanometrics has intervened as a defendant.

At the outset of the protest, the government asserted that Congress in adopting this type of acquisition process specifically exempted it from judicial review, Def.'s Cross-Mot. at 15-17, but the government has since conceded that the court has jurisdiction to evaluate whether the Air Force followed applicable CSO procedures. *See* Hr'g Tr. 49:4-19 (Aug. 20, 2021). [2] The court concludes that it maintains jurisdiction over the protest, but it can only evaluate whether the government followed its own process.

[2] The date will be omitted from further citations to the transcript of the hearing conducted on August 20, 2021.
As counsel for the government stated at the hearing on the cross-motions: "[T]his is a procurement .... [The CSO] authority was specifically designed to create [ ] a procurement methodology ... [s]o it is within the general jurisdiction of the court. But ..., we also have to give effect to Congress'

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specific direction to say this is going to be evaluated through a peer review process." Hr'g Tr. 49:12-19.

Notwithstanding Kinemetrics' claims of error, the agency's sophisticated evaluation for this technologically advanced project is subject to a high degree of judicial deference. In this instance, the court cannot overturn the results of the peer review of the proposals the Air Force received. Based on the documentary materials of record, the court has found no indication that the deference accorded the Air Force was abused.

BACKGROUND [3]

[3] The government has not filed the administrative record. Therefore, the recitations that follow do not constitute findings of fact but rather are recitals attendant to the pending motions and reflect matters drawn from the complaint, the parties' briefs, and records and documents appended to the complaint and briefs. Nonetheless, with advance notice and the consent of the parties, extensive materials from what would constitute the administrative record have been submitted by the parties. *See infra*, at —— & n. 7, —— & n. 9.

A. Commercial Solutions Opening Agreements

The agreement protested in this case was issued as a Commercial Solutions Opening, a procurement method of limited application. Def.'s Cross-Mot. at 5. Title 10, Chapter 139 of the United States Code provides the authority for the Department of Defense to conduct acquisitions pertaining to research and development. *See* 10 U.S.C. ch. 139 ("Research and Development"). Specifically pertinent to this case, Section 2371 of Title 10 states that the respective leader of each military department "may enter into transactions (other than contracts, cooperative agreements, and grants) under the authority of this subsection." 10 U.S.C. § 2371(a). This authority applies only to "basic, applied, and advanced *research projects*." 10 U.S.C. § 2371 (emphasis added). In 2015, Congress amended Title 10 to provide additional authority to the Department of Defense, adopting Section 2371b. *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 815, 129 Stat. 726, 893. Section 2371b authorizes select individuals "under the authority of section 2371 of this title, [to] carry out *prototype projects* that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces." 10 U.S.C. § 2371b(a) (emphasis added). The Section expressly provides that the Department could, but need not, award follow-on production contracts to participants in these projects. *Id.* § 2371b(f)(1). If certain conditions are met, such a production contract "may be awarded ... without the use of competitive procedures." *Id.* § 2371b(f)(2). Pursuant to this other-transaction authority, the Defense Innovation Unit Experimental developed what it called a commercial solutions opening that begins with a broad "area of interest" announcement, followed by phased evaluations—*i.e.*, focused first on a high-level technical evaluation of expressions of interest, followed by more and more detailed evaluations as the procuring agency and responding interested party or parties developed a scope of work. *See* Defense Innovation Unit Experimental, *DIUx Commercial Solutions Opening How-to Guide* (Nov. 30, 2016), https://apps.dtic.mil/dtic/tr/fulltext/u2/1022451.pdf.

***2** Late in 2016, Congress established the "defense commercial solutions opening pilot program," which permitted the military to "acquire innovative commercial items, technologies, and services through a competitive selection of proposals resulting from a general solicitation and the peer review of such proposals." National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 879(a), 130 Stat. 2000, 2312. Congress provided that the "[u]se of general solicitation competitive procedures for the pilot program ... shall be considered to be use of competitive procedures for purposes of chapter 137 of title 10, United States Code." *Id.* § 879(b). Similar to the CSO approach developed by the Defense Innovation Unit Experimental, the 2017 NDAA CSO pilot program created an acquisition structure "under which the Secretary [of Defense] may acquire innovative commercial items, technologies, and services." *Id.* § 879. [4]

[4] Unless extended by Congress, a sunset clause provides that this authority expires September 30, 2022. *See* Section 879(g), 130 Stat. 2313 ("The authority to enter into contracts under the pilot program shall expire on September 30, 2022.").

B. The CSO

The Air Force Technical Applications Center issued a Commercial Solutions Opening on March 13, 2020. Am. Compl. Ex. 1, ECF No. 35-1. The mission objective of the procuring agency is to "provide[ ] technical measurements to monitor nuclear treaty compliance and develop[ ] advanced nuclear proliferation monitoring technologies." Def.'s Cross-Mot. at 3 (citing *Air Force Technical Applications Center Fact Sheet*, Sixteenth Air Force (Air Forces Cyber), https://www.16af.af.mil/About-Us/Fact-Sheets/Display/Article/1963049/air-forcetechnical-applications-center/ (last visited Aug. 30, 2021). The Air Force initially sought "the best approaches to meet the technology objectives within" eight specified capability areas. Am. Compl. Ex. 1 ¶ 2.1. [5] On May 14, 2020, the agency issued an amendment to the CSO, opening a ninth topic which is at issue in this protest, seeking "new and innovative capabilities and technological advancements for the replacement of obsolete [geophysical field systems ("GFS")] seismometers and data acquisition system currently operating at 31 locations around the world," Am. Compl. Ex. 2 at Amend. 0001 ¶ 1, some of which have been installed in remote (and classified) locations. [6] Each topic was accompanied by a description of the agency's needs and requirements, and the CSO noted that "[s]ubmissions should identify innovative solutions that fill capability needs ... [and] can also directly improve the effectiveness or efficiency of operating and/or maintaining current ... capabilities." Am. Compl. Ex. 1 Attach. 6. Additionally, any award made pursuant to the CSO would "be in the form of contracts or other transactions ... as codified in 10 U.S.C. § 2371b." Am. Compl. Ex. 1 ¶ 3.1.

5 These areas were (1) Geophysics and Seismology, (2) Air and Space, (3) Directed Energy Weapon, (4) Nuclear and Nuclear-Related Materials Analysis, (5) Materials Modeling and Analysis, (6) Enterprise Wide Integration and Architecture Modernization, (7) Enterprise Asset and Lifecycle Management Improvements, and (8) High Performance and Secure Cloud Computing and Dev Ops Solutions for Data Ingestion, Exploitation, and Dissemination. Am. Compl. Ex. 1 Attach. 6.

6 In essence, by adding the ninth topic, the Air Force sought to acquire technologically advanced seismic monitoring equipment for detecting and monitoring nuclear weapons testing conducted around the world by other nations. Sensors are put down bore holes to measure seismic waves, and the resulting data from about 3,600 sensors is transmitted to one of the 31 aggregator locations. Hr'g Tr. 53; 5-7.

The CSO outlined the submission and evaluation process which would occur in two phases. Am. Compl. Ex. 1 ¶ 5. During Phase I, all interested offers could submit "Quad Charts and White Papers" prior to April 30, 2021. Am. Compl. Ex. 1 ¶ 5.1. Following review of the Phase I submissions, the agency would "invite select[ed] [o]fferors to submit full proposals based on favorable evaluation results of Phase I submissions." Am. Compl. Ex. 1 ¶ 5.1. For the ninth topic at issue in this protest, however, Amendment 0001 deviated from the two-phase proposal process outlined in the initial CSO. The amendment sought "not a call for white papers" but rather invited "[i]nterested parties [to] submit a complete technical and cost proposal." Am. Compl. Ex. 2 at Amend. 0001 ¶ 3. The proposals would be evaluated based on (1) technical merit/applicability, specifically the "ability to meet threshold capability requirements," (2) "[b]est approach to meet the technology objectives," (3) pricing, (4) "[d]elivery Order 0001" which included "[t]echnical [a]pproach and [p]rice," and (5) the availability of funds. Am. Compl. Ex. 2 at Amend. 0001 ¶ 5.5.1.3. All evaluation factors were "of equal importance." Am. Compl. Ex. 2 at Amend. 0001 ¶ 5.5.1.3. While the contracting officer would conduct the price analysis, the amendment indicated that all other evaluative steps would be conducted by "[p]eer and/or scientific review." Am. Compl. Ex. 2 at Amend. 0001 ¶ 5.5.1.3.

***3** The agency received three proposals responding to the ninth topic, including ones from Kinemetrics and Nanometrics. Def.'s Cross-Mot. at 11; Hr'g Tr. 37:1-3. The Air Force "chose to fund a proposal submitted by Nanometrics" and "chose not to fund the proposal submitted by Kinemetrics." Def.'s Cross-Mot. at 11. The government's evaluation explained that "the Kinemetrics proposal met thresholds for core requirements[,] and the team determined it would have low technical risk." Am. Compl. Ex. 3 at 1. Additionally, it observed that "[m]ost of the products proposed by Kinemetrics would be deliverable within 90 days." Am. Compl. Ex. 3 at 1. It added, however, that "[o]ne significant observation from the team was that infrastructure changes would be necessary at each of the GFS sites to supply the electrical power required by the Kinemetrics equipment, which would ultimately increase the GFS life cycle cost." Am. Compl. Ex. 3 at 1. "Based on the above analysis," the evaluation concluded, "the Government determined the

contractor's proposal [is] technically acceptable, but does not recommend a contract award." Am. Compl. Ex. 3 at 2.

C. Procedural History

Kinemetrics filed a protest at the Government Accountability Office ("GAO") on May 10, 2021. Am. Compl. ¶ 56. The Air Force filed a motion to dismiss Kinemetrics' protest as untimely, Am. Compl. ¶ 58, and Kinemetrics subsequently withdrew that protest, Am. Compl. ¶ 59. Kinemetrics then filed its complaint in this court on July 28, 2021, along with a motion for a preliminary injunction. *See* Compl.; Pl.'s Mot.; Pl.'s Mem. Plaintiff challenged the Air Force's evaluation as violating the Competition in Contracting Act and relevant regulations. Am. Compl. ¶¶ 62-85. Specifically, Kinemetrics objected to the agency's assessment that Kinemetrics' proposal required "infrastructure changes ... at each of the GFS sites to supply the electrical power required by Kinemetrics equipment, which would ultimately increase the GFS life cycle cost" and which "would require the program office to manage or accept external cost and schedule risks due to required changes for power infrastructure at the field sites." Am. Compl. ¶¶ 1-2 (internal quotations omitted). The government's cross-motion to dismiss responded to Kinemetrics' motion. Def.'s Cross-Mot. The cross-motions have been fully briefed, *see* Def-Int. Nanometrics' Resp., ECF No. 27; Pl.'s Resp. and Reply, ECF No. 32; Def.'s Reply, ECF No. 33, and the court held a hearing on August 20, 2021. On August 30, 2021, the court denied Kinemetrics' motion for a preliminary injunction, advising that an opinion would follow in due course. *See* Order of August 30, 2021, ECF No. 40.

STANDARDS FOR DECISION

A. Jurisdiction

The Tucker Act provides this court with "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). The plaintiff must establish jurisdiction by a preponderance of the evidence. *See Trusted Integration, Inc. v. United States,* 659 F.3d 1159, 1163 (Fed. Cir. 2011) (citing *Reynolds v. Army & Air Force Exch. Serv.,* 846 F.2d 746, 748 (Fed. Cir. 1988)).

B. Standing

The plaintiff has the burden of establishing standing to bring a bid protest. *See Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "A party seeking to establish jurisdiction under § 1491(b)(1) must show that it meets § 1491(b)(1)'s standing requirements, which are 'more stringent' than the standing requirements imposed by Article III of the Constitution." *Diaz v. United States*, 853 F.3d 1355, 1358 (Fed. Cir. 2017) (quoting *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009)). To satisfy these more stringent requirements, a plaintiff must show that it is an "interested party," *see Digitalis Educ. Sols., Inc. v. United States*, 664 F.3d 1380, 1384 (Fed. Cir. 2012) (quoting *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1307 (Fed. Cir. 2006)), and "that it was prejudiced by a significant error in the procurement process," *Labatt Food Serv., Inc. v. United States*, 577 F.3d 1375, 1378 (Fed. Cir. 2009) (citing *JWK Int'l Corp. v. United States*, 279 F.3d 985, 988 (Fed. Cir. 2002)).

***4** An interested party is an "actual or prospective bidder[ ] or offeror[ ] whose direct economic interest would be affected by the award of the contract or by the failure to award the contract." *Weeks Marine*, 575 F.3d at 1359 (quoting *American Fed'n of Gov't Emps. v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001)). To have a direct economic interest, the plaintiff must show that it had a substantial chance of winning the contract. *See Digitalis*, 664 F.3d at 1384. An interested party suffers prejudice from a significant procurement error when "but for the error, it would have had a substantial chance of securing the contract." *CliniComp Int'l, Inc. v. United States*, 904 F.3d 1353, 1358 (Fed. Cir. 2018) (emphasis omitted) (quoting *Labatt*, 577 F.3d at 1378); *see also Red Cedar Harmonia, LLC v. United States*, 144 Fed. Cl. 11, 21 (2019), *aff'd*, 840 Fed. Appx. 529 (2020). The prejudice inquiry and the economic-interest inquiry must not be conflated—"an error [may be] non-prejudicial to an economically interested offeror." *CliniComp*, 904 F.3d at 1358 (quoting *Labatt*, 577 F.3d at 1379-80); *see also Veteran Shredding, LLC v. United States*, 140 Fed. Cl. 759, 765 (2018) ("Despite the potential relevance of prejudice in determining substantial chance, direct economic interest should still be evaluated separately from prejudice."). "A party cannot be

prejudiced unless it first has a substantial chance of [obtaining the] award." *Veteran Shredding*, 140 Fed. Cl. at 765.

C. Failure to State a Claim

Under Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC") a complaint will survive a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The factual matters alleged "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555-56, 127 S.Ct. 1955 (citations omitted).

In evaluating the government's motion to dismiss for failure to state a claim, the court notes that this aspect of the government's cross-motion is akin to a motion for judgment on the administrative record and that a formal administrative record has not been filed. Key elements of that record have nonetheless been submitted by Kinemetrics in connection with its complaints and briefs and by the government in connection with the briefs. Those submissions took into account the extensive discussion at the initial conference held in this protest that the government intended to file a cross-motion to dismiss. *See* Hr'g Tr. 6:21 to 7:17 (July 30, 2021). [7] The question before the court in evaluating this aspect of the case is whether the parties consented to adjudicate a motion to dismiss in the absence of the filing of a certified, complete administrative record and whether appropriate portions of the administrative record before the Air Force have been provided such that the court may address the merits of the government's motion. Those questions will be resolved *infra*, at —— & n. 9.

[7] As counsel for the protestor stated, "the issue in the protest is extremely narrow," Hr'g Tr. 8:3-4 (July 30, 2021), and that "some type of limited agency record" should be provided, *id.* at 8:2-3.

ANALYSIS

A. Jurisdiction

The bid protest provisions of the Tucker Act are "exclusively concerned with procurement solicitations and contracts." *Space Expl. Techs. Corp. v. United States*, 144 Fed. Cl. 433, 439 (2019) (quoting *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1245 (Fed. Cir. 2010)). In short, the court's bid protest jurisdiction is limited to those that are "in connection with a procurement or a proposed procurement," *id.* (quoting 28 U.S.C. § 1491(b)(1)). Although "the operative phrase 'in connection with' is very sweeping in scope," *id.* (brackets omitted) (quoting *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999)), governmental actions have fallen outside the court's bid protest jurisdiction where they "did not begin 'the process for determining a need for property or services,' " "had no effect upon the award or performance of any contract," and were "of a developmental nature," *id.* at 440 (citations omitted). Consequently, the court lacks protest jurisdiction where other-transaction solicitations are "separate and distinct" from procurement solicitations. *Id.* at 442-45 (holding that an other-transaction solicitation to develop space launch infrastructure was not "in connection with" a future, contemplated procurement solicitation for space launch services because rejection under the former did not preclude consideration under the latter, rendering the latter "separate and distinct").

***5** In this instance, Delivery Order 0001—for equipment configured to work at the ILAR seismic station at Eielson Air Force Base, Alaska—was included in the opening CSO itself. *See* Am. Compl. Ex. 2 ¶ 5.3.3. Further, the technical evaluation letter that the agency sent to plaintiff to inform it of the rejection of its proposal recommended against awarding a contract. *See* Am. Compl. Ex. 3 at 2. ("Based on the above analysis, the Government determined the contractor's proposal is technically acceptable, but does not recommend a contract award."). Unlike the facts of *Space Exploration Technologies*, where no procurement contract was contemplated, this solicitation had a direct effect on the award of a contract. This solicitation resulted in a standard indefinite delivery, indefinite quantity contract for GFS equipment from Nanometrics. The CSO and the resulting technical evaluation were not "separate and distinct" from the decision to procure from an offeror or another because, unlike *Space Exploration Technologies*, rejection in the evaluation

phase did disqualify plaintiff from consideration for the follow-on production contract contemplated by the CSO.

Accordingly, the court concludes that it has jurisdiction to review this CSO because it was "in connection with" a procurement.

B. Standing

Intervenor raises the issue of plaintiff's standing to bring this bid protest. Def.-Int.'s Resp. at 3-5. Specifically, it argues that unlike "a traditional competitive acquisition," where "offerors compete against one another for the award of the resulting contract," proposals in a CSO "need not be evaluated against each other," and CSOs resemble broad agency announcements (which arguably do not give a disappointed offeror standing). *Id.* at 3-4. Therefore, intervenor reasons, "Kinemetrics has no basis to challenge the Air Force's decision to award a contract under the CSO acquisition to any other offeror, including the contract to Nanometrics." *Id.* at 4. Additionally, it contends that Kinemetrics lacks standing because the CSO permitted the agency to award to multiple awardees, *Id.* at 4-5 (quoting *Microcosm, Inc.*, B-277326, *et al.*, 97-2 CPD ¶ 133 (Comp. Gen. Sept. 30, 1997)). The court disagrees.

Kinemetrics was one of three companies that responded to the solicitation in question. Hr'g Tr. 37:1-2. The government's evaluation determined that plaintiff's proposal was technically sufficient and within available funds. Am. Compl. Ex. 3. Regardless of whether plaintiff's proposal was compared with intervenor's or whether the agency could have awarded to multiple offerors, Kinemetrics actually submitted a proposal that was found technically sufficient. Its proposal was rejected because the government determined that Kinemetrics' proposed power draw requirements were too high. But for the government's power evaluation, plaintiff—one of three companies that responded to the agency's CSO and whose proposal was found technically sufficient—had a substantial chance of winning the award of the contract. Therefore, the court concludes that Kinemetrics has standing to bring this protest.

C. Failure to State a Claim

The government contends that Kinemetrics failed to state a claim upon which relief can be granted because its two primary arguments—that the agency considered unstated evaluation criteria and that its technical evaluation was irrational—arose because of the results of the Air Force's peer review and thus were within the agency's discretion. Def.'s Cross-Mot. at 17-21. The key question is whether plaintiff's contentions "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955.

1. Unstated evaluation criteria.

First, Kinemetrics claims that the Air Force considered unstated evaluation criteria when it took account of "(1) whether there was any external cost; (2) schedule impacts; and (3) the supply of power and/or power infrastructure." Pl.'s Mem. at 3. The government responds that the solicitation "disclosed that [the agency] would broadly evaluate whether proposals present the '[b]est approach to meet the technology objectives.' " Def.'s Cross-Mot. at 17 (ellipses omitted) (citing Compl. Ex. 3 ¶ 5.5.1.3). At the hearing, counsel for the government explained that power draw—and related cost and scheduling impacts—was "not necessarily an element of the equipment's capability," Hr'g Tr. 47:6-7; instead, "it is relevant to whether [Kinemetrics' proposal] meets the second criteria, the overall best approach to meet the technology objectives[. B]ecause it's not that it would be impossible for Air Force to accommodate different power draws[;] it would just take different work on the agency side of things." Hr'g Tr. 48:2-7. Plaintiff maintained in its reply that cost, schedule, and power infrastructure were technical evaluation criteria because that "is where this whole issue of power draw is addressed by the [g]overnment in what's been produced." Hr'g Tr. 58:17-18.

***6** Agencies "may consider elements that, while not explicitly stated in the solicitation, are 'intrinsic to the stated factors.' " *Poplar Point RBBR, LLC v. United States*, 147 Fed. Cl. 201, 219 (2020) (quoting *Coastal Int'l Sec., Inc. v. United States*, 93 Fed. Cl. 502, 531 (2010)). They "retain 'great discretion' in determining the scope of a given evaluation factor." *Id.* (quoting *PlanetSpace, Inc. v. United States*, 92 Fed. Cl. 520, 536 (2010)). Plaintiff "must show that the procuring agency used a 'significantly different basis in evaluating the proposals than was disclosed' in the solicitation." *Id.* (quoting *PlanetSpace*, 92 Fed. Cl. at 536-37). "Best approach" is a broad criterion, and Kinemetrics has not attempted to show, much less actually shown, that the amount of work its proposal would require of the agency to accommodate the power draw of its equipment is outside the scope of this evaluation factor. Kinemetrics points out that power infrastructure was a topic of concern during the

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question-and-answer phase of the solicitation, *see* Pl.'s Mem. at 9, but that itself undermines any concern that power draw was "significantly different" from what the agency disclosed or from what plaintiff could have contemplated, *Poplar Point*, 147 Fed. Cl. at 219. [8]

[8] The power draw of the equipment proffered by each of the three who responded to the solicitation was extensively evaluated in studies performed by Sandia National Laboratories. *See* Def.'s Cross-Mot. Ex. 2, Sandia Report (Mar. 2020) at 3, 15 (analyzing power consumption). Earlier in 2018, Sandia National Laboratories had evaluated equipment provided by Kinemetrics and Nanometrics, along with that of other possible providers. *See* Am. Compl. Exs. 2, 3, Sandia Reports on Kinemetrics and Nanometrics (Oct. 2018), ECF Nos. 35-2 and 35-3.

The court concludes, therefore, that the agency did not abuse its discretion in determining that power draw and its implications were within the scope of "[b]est approach."

2. Rational basis for the government's evaluation.

Second, Kinemetrics argues that the agency's "evaluation determined incorrectly that [its] equipment required an infrastructure change to connect to [g]overnment power" and that "[t]here is no rational basis for the [g]overnment's determination." Pl.'s Mem. at 15. Defendant responds that plaintiff's argument asks the court to second-guess the agency's technical expertise, *see* Def.'s Cross-Mot. at 18 ("Kinemetrics' other claim is that [the agency] was 'technically incorrect' when it determined that installing Kinemetrics' equipment would require changes to the local power infrastructure."), which it claims is outside the court's competence to address, *see id.* at 19 ("Courts have long recognized that the merits of an agency's expert technical and scientific decisions are committed to agency discretion and unreviewable, particularly where the agency's decisions result from a technical or scientific peer review process.") (citing *Apter v. Richardson*, 510 F.2d 351, 355 (7th Cir. 1975) (other citations omitted)). Kinemetrics replies that "[n]o technical expertise is needed to know ... that the evaluation was irrational in that it contradicted its own terms." Pl.'s Reply at 17. It contends that the government's analysis does not match its stated conclusion for rejecting plaintiff's proposal. *Id.* at 15-16 ("The [g]overnment's evaluation rejecting Kinemetrics gives a single reason for rejecting Kinemetrics—that the power infrastructure will need to be upgraded, thus creating the risk of external cost. The evaluation eighth system capability does not state that the infrastructure will need to be upgraded and no analysis is provided regarding any external cost risk.").

"In a bid protest case, the inquiry is whether the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and, if so, whether the error is prejudicial." *Glenn Def. Marine (ASIA), PTE Ltd. v. United States*, 720 F.3d 901, 907 (Fed. Cir. 2013) (citing 28 U.S.C. § 1491(b)(4), which adopts the standard of 5 U.S.C. § 706). "[A]n agency's decision [is] arbitrary and capricious when the agency 'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.' " *Alabama Aircraft Indus., Inc.-Birmingham v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (alterations in original) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). "The arbitrary and capricious standard applicable in bid protests is highly deferential." *Glenn Defense Marine*, 720 F.3d at 907 (brackets omitted) (quoting *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1058 (Fed. Cir. 2000)) (alterations in original).

***7** Inasmuch as Kinemetrics challenges the correctness of the government's technical evaluation, the court defers to the agency's expertise, especially in the context of a peer-review process regarding specialized, scientific equipment and available resources at a variety of locations, some of which are remote. *See Terex Corp. v. United States*, 104 Fed. Cl. 525, 532 (2012) ("[W]here the resolution of an issue 'requires a high level of technical expertise,' it is 'properly left to the informed discretion of the responsible federal agencies.' " (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976)). The agency is better situated than the court to know what its power infrastructure can deliver at the 31 monitoring sites, as well as the hurdles and level of effort required to implement changes to that infrastructure based on plaintiff's proposal.

Nonetheless, Kinemetrics asserts that the government's evaluation process "was irrational and unsupported by evidence." Pl.'s Reply at 13; *see also* Hr'g Tr. 16:19-24 ("[W]ithout getting into the technical [details], there doesn't seem to be a rational basis because they were talking about external costs and schedule risks, but there was no evaluation

of what would the additional costs be."). This contention runs counter to the Air Force's evaluation letter, which states that "infrastructure changes would be necessary at each of the GFS sites to supply the electrical power required by the Kinemetrics equipment, which would ultimately increase the GFS life cycle cost." Am. Compl. Ex. 3 at 1. Although the letter does not offer any details to explain this observation, that does not demonstrate that the government acted arbitrarily or capriciously by offering an explanation that is inconsistent with the evidence. The evaluation letter's brief explanation indicates, to the contrary, that the agency did consider the impact that power draw would have on the overall objectives of the acquisition. *See* Am. Compl. Ex. 3 (observing that "[m]ost of the products proposed by Kinemetrics would be deliverable within 90 days" but then raising the issue of "infrastructure changes").

Moreover, the court cannot say the agency's explanation is counter to the evidence without substituting its judgment for the agency's on a technical question, which it may not do. The Air Force conducted market research in 2018 prior to issuing the solicitation at issue here, and this research produced reports on both Kinemetrics' and Nanometrics' available equipment (totaling 217 pages for the report on Kinemetrics' equipment and 185 pages for Nanometrics'). Am. Compl. Ex. 7. Those reports specifically addressed power draws. *Id.* This market research was then followed by peer review of Kinemetrics' and Nanometrics' proposals pursuant to the solicitation. To conclude that the agency's explanation concerning power draw and cost and schedule risks is contrary to that evidence would require the court to second-guess evidently extensive expert engineering research on the agency's part over the span of several years. The narrowness of the court's review does not permit such reanalysis in the context of nuclear event detection in pursuit of national security. *Cf. PMTech, Inc. v. United States*, 95 Fed. Cl. 330, 356 (2010) ("[T]his court has neither the legal authority nor the institutional competence to substitute its judgment for that of an administrative agency in an area as committed to agency expertise and discretion as the assessment of risks to human health and safety from radioactive and other hazardous materials contamination.").

On the record before this court, there is no indication that the agency acted arbitrarily, capriciously, in abuse of its discretion, or otherwise not in accordance with law. The question becomes whether that record is adequate to allow the court to rule on the government's motion to dismiss for failure to state a claim. Ordinarily, the materials provided, although key to the procurement, would not suffice because the record is not complete and is not certified. *See Banner Health v. Sebelius*, 797 F. Supp. 2d. 97, 112 (D.D.C. 2011) (recognizing "the dangers associated with proceeding with judicial review 'on the basis of a partial and truncated record' without the consent of the parties") (quoting *Natural Res. Def. Council, Inc. v. Train*, 519 F.2d 287, 291-92 (D.C. Cir. 1975)). In this instance, however, the court did have the consent of the parties. *See supra*, at —— n. 2 (noting that, at the initial conference in this protest, the parties advised that the issues presented would be "extremely narrow," that a "limited agency record" should be provided, and that time was pressing because of the nature of the procurement. Hr'g Tr. 8:3-10 (July 30, 2021)). Both parties supplied extensive agency records with their filings, including voluminous reports of findings regarding the proffered technologies and the agency's peer review results. As a result, with the parties' consent, given in advance of briefing the cross-motions, the court may act to resolve the merits. [9]

9 Absent the parties' consent, the court would not have been able to act in this bid protest on the government's motion to dismiss for failure to state a claim. It would have been limited to jurisdictional issues as a basis for a motion to dismiss. *See M.R. Pittman Group, LLC v. United States*, —— Fed. Cl. ——, ——, ——, 2021 WL 2588095, at *2, 4 (June 24, 2021) (granting a motion to dismiss on jurisdictional grounds in reliance on RCFC 12(h)(3), which provides that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action").

CONCLUSION

***8** For the reasons stated, the court GRANTS defendant's motion to dismiss for failure to state a claim. [10]

10 As noted, *see supra* at ——–——, the court earlier had denied Kinemetrics' motion for a preliminary injunction.

The Clerk is directed to enter judgment in accord with this disposition.

No Costs.

It is so **ORDERED**.

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